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RIGHT TO RECOVER ON A MORTGAGE WHICH HAS BEEN TRANSFERRED BY THE MORTGAGEE TO, OR EXECUTED IN FAVOR OF, A RESIDENT OF ANOTHER STATE FOR THE PURPOSE OF EVADING TAXATION.

This is the third appearance in this volume of the question above propounded as a subject of editorial discussion. (55 Cent. L. J. 121, 201.) This is due to the fact that the question, being not only a difficult one, but one sharply controverted as well, has led some of our correspondents to take sides for or against us. Our desire, however, is to be perfectly fair and frank with those holding a different opinion, especially on a question like the present on which there is so much room for reasonable doubt and difference of opinion.

Our conclusion on this question, which no argument hitherto called to our attention has constrained us to abandon, is that a mortgagor has the right to set up the defense of illegality where the mortgage at the solicitation of the mortgagee was executed in favor of a non-resident merely for the purpose of enabling the real mortgagee, to evade the payment of his taxes. Several weeks ago a correspondent in Indiana suggested the case of Nichols v. Sewing Machine Co., 27 Hun 200, affirmed, 97 N. Y. 650, as opposed to this conclusion. This week a correspondent from Wisconsin cites us to a later case, even more directly in point, as sustaining the same objections to the rule just stated. Crowns v. Forest Land Co., 99 Wis. 103, 74 N. W. Rep. 103. In this case it was held that an answer in a foreclosure proceeding alleging that the note and mortgage in suit were taken in the name of the plaintiff for the purpose of enabling the real owner to evade his taxes thereon, presents no ground for a discharge of the mortgagor from his just debt. On this point the court strongly comments as follows:

"Drexler v. Tyrrell, 15 Nev. 114, was cited to support that portion of the answer wherein it is alleged that the note and mortgage were taken in the name of Crowns for the purpose of concealing the same from the assessor, and thus escaping taxation. It is unnecessary to discuss this case. It is based upon the peculiar revenue laws of that state, and has never been recognized as authority outside of its boundaries, so far as we have been able to discover. On the contrary, it has been severely and justly criticized in other jurisdictions, and is regarded as wrong in principle. Jones, on Mortgages, § 619. It is not charged that the note and mortgage in suit were, in themselves, illegal or contravened the policy of the law. The contract between the parties was one they were not prohibited in making, and, so far as anything appears in the answer, the mortgagor received full and complete consideration for it. The only taint in the transaction is the alleged violation of the revenue laws. The law of this state provides that taxes shall be levied upon all the property in the state except such as is exempt. The tax-payer may be examined under oath, and, if he makes a false statement of his property, he is subject to a penalty of ten dollars on every hundred dollars withheld from the knowledge of the assessor. When the revenue laws provide ample punishment for the evasion by tax-payers of their just dues, it would seem a monstrous injustice to permit a mortgagor to defeat a payment of a debt by bringing any such issue into a suit brought to foreclose his mortgage. The alleged turpitude of the mortgagee furnishes no ground for a discharge of the mortgagor from the payment of his just debt."

However strong in language or logic this argument may seem to be, we cannot but regret that a court of last resort should pass over so lightly the heinous offense of tax dodging and express such inordinate sympathy for one who had deliberately and treasonably purposed to defraud the revenue laws of the state. But the argument of the court is fallacious. The fact that the law provides a punishment for evading taxation does not in the least diminish the vitiating effect of its illegality upon a contract of which it is an element by stipulation or otherwise. The same act which is punishable under the law as a crime or a misdemeanor, or which would subject the offender to a fine or penalty, may at the same time invalidate a contract, into the consideration or execution of which its illegality has so vitally entered as to be incapable of separation. And, in such cases, indeed, it is im-

possible to enforce the contract without affirming the illegal stipulation. It is even so in the present case. The mortgage instrument has an illegal element which cannot be separated from that which, otherwise, would have been legal, and it cannot be foreclosed "without legalizing an illegality."

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONAL LAW — WHEN CONSTITUTIONAL PROVISIONS ARE SELF-EXECUTING.—A new legal phrase has made its debut. We must hereafter speak of many provisions of our state constitution as "constitutional statutes." It was the original idea of a constitution to outline a government, not to devise legislation. But in these later years the people have taken to legislating, and their most effective channel in this regard is not the legislature, even with the privilege of the *referendum* added, but the constitution. This latter method, with the sanctity and power which attaches to it, is alone sufficient, it would seem, to satisfy the desire of the people themselves to exercise that supreme authority and sovereignty which stump politicians and orators, assert is theirs. That there could be nothing fatal or *unconstitutional* in such legislation would seem to be self-evident, but it is sometimes reassuring to have our most indisputable rights settled by judicial decision, and that has been the fortunate circumstance in one particular instance. In the recent case of Rice v. Howard, 69 Pac. Rep. 77, the Supreme Court of California wrestled with this problem and decided that legislation by the people which takes the form of a constitutional amendment is self-executing, and does not depend on the approval or initiation of the legislature to make it effective! What a glorious consummation! The sovereign people are no longer to be circumscribed in the exercise of their authority by the will or the ill-will of a legislature or the stern mandate of a supreme court. Why not pass an income tax by constitutional amendment!

The section of the California constitution which was thus characterized as "constitutional legislation," and held to be self-executing, provided that the directors or trustees of corporations shall be jointly and severally liable to the creditors and stockholders for all moneys misappropriated by officers during their terms of office. The court's opinion in this case is a most interesting discussion of this question. Temple, J., speaking for the court, says in part as follows:

"As to the question whether the provision is self-executing, it is well to note at the out-set that the presumption is not precisely as it would have been had such a matter been presented for consideration fifty years ago. When the federal constitution and first state constitutions were formed, the idea of a constitution was that it merely outlined a government, provided for certain departments and some officers and defined their functions, secured some absolute and inalienable rights to the citizens, but left all matters of administration and policy to the departments which it created. The law-making power was vested wholly in the legislature. Save as to the assurances of individual rights against the government, the direct operation of the constitution was upon the government only. And such assurances were themselves in part but limitations upon governmental powers. Latterly, however, all this has been changed. Through distrust of the legislatures, and the natural love of power, the people have inserted in their constitutions many provisions of a statutory character. These are in fact but laws, made directly by the people instead of by the legislature, and they are to be construed and enforced in all respects as though they were statutes. Winchester v. Mabury, 122 Cal. 522, 55 Pac. Rep. 393."

Having established the reason for the departure from the original idea and purpose of constitutional enactments, the court proceeds to illustrate the effect of the later tendency.

"Under former conditions it was natural that the court should presume that a constitutional provision was addressed to some officer or department of the government, or that it limited the power of the legislature, or empowered, and perhaps directed, certain legislation, to carry into effect a constitutional policy. Now, the presumption is the reverse. Recently adopted state constitutions contain extensive codes of laws, intended to operate directly upon the people, as statutes do. To say that these are not self-executing may be to refuse to execute the sovereign will of the people. The different policy requires a different ruling. I should say the rule now is that such constitutional provisions must be held to be self-executing when they can be given reasonable effect, without the aid of legislation, unless it clearly appears that such was not intended. If the legislature must, or even may, provide for the mode of executing such constitutional laws, it may, to a great extent, and in some cases altogether, prevent their having any effect at all. This last effect is precisely what is contended for here. The policies of increasing constitutional legislation and of narrowing legislative power are correlative. The legislature, whose powers and functions the people are thus seeking to limit, would naturally not be afforded the opportunity to remove such limits. The change in mode of constitution making indicates that the legislature is not to be trusted with such power. In general, such constitutional statutes, if I may so speak of them, were intended to prevent the legislature from legislating otherwise upon the subjects covered by such provisions. It has often been remarked that our state constitution of 1879 contains a very extensive code of laws, evidently intended to operate directly upon the people, and which are placed in the constitution for the express purpose of depriving the legislature of the

power to change or modify them. We must submit to this policy established in the fundamental law, and therefore every constitutional mandate which can be put in force without legislation must be held to be self-executing, unless a contrary intent is shown. Such intent would be manifested not only when expressly so stated, but when only a general principle or policy is declared, or when, as in Groves v. Slaughter, 15 Pet. 449, 10 L. Ed. 800, it is ordained that certain acts shall or shall not be prohibited, and only the legislature can make the prohibition, or when certain acts are forbidden, and no penalties or other means of making the prohibition effective have been provided, and in other like cases."

THE DOCTRINE OF REASONABLE DOUBT.

The doctrine of reasonable doubt relates to the application of the law of evidence in the trial of actions in courts of justice established by the respective governments of the world. It concerns, in its due administration, both criminal and civil proceedings.[1] It will be seen, however, as the discussion proceeds, that the doctrine relates, principally, to the question of the main matter of guilt in criminal trials, particularly, in this country.[2] Reasonable doubt has been defined to be "not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."[3] It has also been defined to mean the removal of "all hesitation in the mind of the triers, respecting the truth of the hypothesis attempted to be sustained."[4] The Supreme Court of the United States in a recent case has defined reasonable doubt as "the condition of mind produced by the proof resulting from the evidence in the cause. It is the result of proof, not the proof itself; whereas the presumption of innocence is one of the instruments of proof going to bring about the proof from which reasonable doubt arises: thus one is a cause, the other an effect. To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them. In other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted."[4a] A charge to the jury defining "a reasonable doubt is such a one as an upright man might entertain in an honest investigation after truth from the evidence," is said to be more favorable to the defendant than a strictly accurate definition would warrant. The inference is open to the jury that any doubt, which an upright man might entertain of the prisioner's guilt, would justify an acquittal.[5]

The phrase "moral certainty" signifies only a very high degree of probability, as introduced and used in our jurisprudence.[6] Proof "beyond reasonable doubt" is not beyond all possible or imaginary doubt, but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof "to a moral certainty," as distinguished from an absolute certainty. As applied to a judicial trial for crime, the two phrases are synonymous and equivalent; and each has been used by eminent judges to explain the other; each signifies such proof as satisfies the judgment and conscience of the jury, as

[1] Steph. Dig. Ev. art. 94; Tayl. Ev. sec. 112; 1 Jones Ev. secs. 15, 193; 1 Greenl. Ev. sec. 65, 3 *Id.* sec. 29; Thurtell v. Beaumont, 1 Bing. 339, 8 Moore, 612; Willmett v. Harmer, 8 Car. & P. 695; Chalmers v. Shackell, 6 Car. & P. 475; Schultz v. Pacific Ins. Co., 14 Fla. 73; Sprague v. Dodge, 48 Ill. 142, 95 Am. Dec. 523 and extended note.

[2] 1 Bish. Crim. Proc. sec. 1053; 1 Jones, Ev. sec. 15; 1 Stark. Ev. sec. 478; 3 Greenl. Ev. sec. 29; Ellis v. Buzzell, 60 Me. 209, 11 Am. Rep. 204; Blaeser v. Milwaukee Mechanic's Mut. Ins. Co., 37 Wis. 31, 19 Am. Rep. 747; Elliott v. Van Buren, 33 Mich. 99, 20 Am. Rep. 668; Jones v. Greaves, 26 Ohio St. 2, 20 Am. Rep. 752.

[3] Commonwealth v. Webster, 59 Mass. 295 on 320 (5 Cush.).

[4] North American Review for January, 1851, p. 201

[4a] Coffin v. United States, 156 U. S. 432.

[5] Peterson v. State, 47 Ga. 524. See also 4 Sawy. 517 (U. S.), 9 Bush, 593 (Ky.), 1 Dak. Try. 466, 39 Ill. 458, 73 *Id.* 329, 23 Ind. 170, 58 *Id.* 293, 9 Tex. App. 299, 62 Me. 129, 142, 3 Crim. L. Mag. 350, 351, 2 Dutch. (N. J.) 602, 38 Mich. 482, 72 Mo. 376, 74 *Id.* 213, 118 Mass. 1, 23, 24 (4 Lath.).

[6] Commonwealth v. Costley, 118 Mass. 1, 23 (4 Lath.); Commonwealth v. Goodwin, 14 Gray (Mass.), 57; Best, Prin. Ev. 100; Wills' Circumst. Ev. 210, 52 Am. Dec. 711; Commonwealth v. Webster, 59 Mass. 295, 320 (5 Cush.); Whart. Am. Crim. L. 284, 285. See also Wills Circumst. Evi. 157, 162.

reasonable men, applying their reason to the evidence before them, that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible.[7] The doctrine of reasonable doubt is that degree or quantity of evidence necessary to generate full belief of the fact sought to be established, to the exclusion of all reasonable doubt. It has been held as peculiarly applicable to criminal trials. Greater strictness of proof is required in these trials, than in civil causes, and the defendant is allowed to take advantage of nicer exceptions. This doctrine has not been supposed to be equally applicable to civil cases.[8] It is said that "where civil rights are to be ascertained, a less degree of probability may be safely adopted as a ground of judgment, than in criminal cases, which affect life and liberty."[9] And Blackstone does not hesitate to say that "all presumptive evidence of felony should be received cautiously; for the law holds, that it is better that ten guilty persons escape, than that one innocent suffer."[10] In criminal actions, however, it is well settled in this country and in England, that the commission of crime must be proved beyond a reasonable doubt. To this proposition there is no exception.[11] In civil cases, too, where crime was imputed, it was held for a long time, that the rule of the criminal law, requiring an offense to be proved beyond a reasonable doubt, applied.[12] This doctrine is still sustained by the weight of authority in England.[13]

A reason for this rule is given by Lord Kenyon, one which does not exist in this country, viz.: "When a defendant justifies words which amount to a charge of felony and proves his justification, the plaintiff may be put upon his trial by that verdict without the intervention of a grand jury."[14] In the United States there are a few authorities which hold that when a criminal act was involved in a civil case, proof beyond a reasonable doubt must be established.[15] But the current of recent decisions in this country, as well as the better reason, supports the proposition, that in civil actions, where the charge of crime is, or is not to be established, the introduction of a preponderance of testimony is sufficient.[16] The English rule is thus stated by Stephen: "If the commission of a crime is directly in issue in any proceeding, criminal or civil, it must

[7] Commonwealth v. Costley, 118 Mass. 1, 24 (4 Lath.); Commonwealth v. Goodwin, 14 Gray (Mass.), 57; Commonwealth v. Tuttle, 12 Cush. (Mass.) 502; State v. Newman, 7 Ala. 69; Shultz v. State, 13 Tex. 401; Brown v. State, 23 *Id.* 195; People v. Thayer, 1 Parker, C. C. 595; Tweedy v. State, 5 Iowa, 433; People v. Milgate, 5 Cal. 127; Pate v. People, 3 Gilm. 644, 661; Hiler v. State, 4 Blackf. 552; Wise v. State, 2 Kan. 419; Sumner v. State, 5 Blackf. 579; 2 Hale, P. C. 290; Blaeser v. Milwaukee Mechanics' Mut. Ins. Co., 37 Wis. 31, 36; 1 Stark. Ev. 478, 1 Hale, P. C. 300.

[8] Schmidt v. New York Union Mut. Fire Ins. Co., 1 Gray (Mass.), 529, 533, 534; 1 Bish. Crim. Proc. sec. 1050; 3 Greenl. Ev. sec. 29; 2 Russ. on Crimes (17th Am. Ed.), 727.

[9] 2 Russ. on Crimes, 727. See also to the same effect, McNally, Ev. 578; Blaeser v. Milwaukee Mechanic's Mut. Ins. Co., 37 Wis. 31, 36; Ellis v. Buzzell, 60 Me. 209.

[10] 4 Bl. Com. 358.

[11] Commonwealth v. Webster, 59 Mass. 295 (5 Cush.); Giles v. State, 6 Ga. 276; Wasden v. State, 18 *Id.* 264; State v. King, 20 Ark. 166; Fuller v. State, 12 Ohio St. 433; Satterwhite v. State, 28 Ala. 65; State v. Porter, 34 Iowa, 131, 1 Green, Crim. L. 241; Washington Union Ins. Co. v. Wilson, 7 Wis. 169; Hoffman v. Western Fire & Marine Ins. Co., 1 La. Ann. 216.

[12] Steph. Ev. art. 94; Tayl. Ev. sec. 112; Chalmers v. Shackell, 6 Car. & P. 475; Willmett v. Harmer, 8 *Id.* 695; Thurtell v. Beaumont, 1 Bing. 339; Kane v. Hibernia Ins. Co., 9 Vroom. 441; Corbley v. Wilson, 71 Ill. 209; Merk v. Gelzhaeuser, 50 Cal. 631; Coulter v. Stuart, 2 Yerg. (Tenn.) 225.

[13] Steph. Ev. art. 94, 8 Moore, 612; Thurtell v. Beaumont, 1 Bing. 339; Willmett v. Harmer, 8 Car. & P. 695; Chalmers v. Shackell, 6 *Id.* 475.

[14] Cook v. Fields, 3 Esp. 133.

[15] Clark v. Dibble, 16 Wend. 601; Hopkins v. Smith, 3 Barb. 599; Woodbeck v. Keller, 6 Cow. 116; Kane v. Hibernia Ins. Co., 9 Vroom. 441, 20 Am. Rep. 409; Corbley v. Wilson, 71 Ill. 209, 22 Am. Rep. 98; Merk v. Gelzhaeuser, 50 Cal. 631; Tucker v. Call, 45 Ind. 31; Polston v. See, 54 Mo. 291; Williams v. Gunnells, 66 Ga. 521; Steinman v. McWilliams, 6 Barr (Pa.), 170; Lanter v. McEwen, 8 Blackf. 495; Shultz v. Pacific Ins. Co., 14 Fla. 73; Coulter v. Stuart, 2 Yerg. (Tenn.) 225. See also Sprague v. Dodge, 48 Ill. 142, 95 Am. Dec. 523 and note.

[16] Knowles v. Scribner, 57 Me. 497; Ellis v. Buzzell, 60 Me. 209, 11 Am. Rep. 204; Jones v. Greaves, 26 Ohio St. 2, 20 Am. Rep. 752; Bell v. McGinness, 40 Ohio St. 204, 48 Am. Rep. 673; Matthews v. Huntley, 9 N. H. 150; Folsom v. Brown, 25 N. H. 114; Watkins v. Wallace, 19 Mich. 57; Elliott v. Van Buren, 33 Mich. 99, 20 Am. Rep. 668; Blaeser v. Milwaukee Mechanic's Mut. Ins. Co., 37 Wis. 31, 19 Am. Rep. 747; Hartwig v. Chicago & Northwestern Ry. Co., 49 Wis. 358; Whitney v. Clifford, 57 Wis. 156; United States Express Co. v. Jenkins, 73 Wis. 471; Rothschild v. Amer. Ins. Co., 62 Mo. 356; Behrens v. Germania Ins. Co., 58 Iowa, 26; Seybolt v. New York Ry. Co., 95 N. Y. 562, 47 Am. Rep. 75; Heiligmann v. Rose, 81 Tex. 222, 26 Am. St. Rep. 804; Schmidt v. New York Union Mut. Ins. Co., 1 Gray (Mass.), 529; Roberge v. Burnham, 124 Mass. 277; Thoreson v. Northwestern Ins. Co., 29 Minn. 107; Weston v. Gravlin, 49 Vt. 507; Marshall v. Thames Ins. Co., 43 Mo. 586; Munson v. Atwood, 30 Conn. 102; Scott v. Home Ins. Co., 1 Dill. C. C. 105; Kincade v. Bradshaw, 3 Hawk. 63.

be proved beyond a reasonable doubt."[17] And this is said to have the weight of authority in its support to-day. The American view has been well stated by Barrows, J., in the case of Ellis v. Buzzell, *supra:* "We think it time to limit the application of a rule, which was originally adopted *in favorem vitæ* in the days of a sanguinary penal code, to cases arising on the criminal docket, and no longer to suffer it to obstruct or incumber the action of juries in civil suits sounding only in damages." This was an action for slander in charging the plaintiff with adultery, a crime under the statutes of Maine. The plea interposed was that the words were true, and the court held that a preponderance of evidence would support the plea. In disposing of the case and the legal question suggested, the court said further: "If the words said to be slanderous impute to the plaintiff the commission of a crime, the defendant must fasten upon the plaintiff all the elements of the crime, both in act and intent; and to do this he must furnish evidence enough to overcome in the minds of the jury the natural presumption of innocence, as well as the opposing testimony. But to go further and say that this shall be done by such a degree and quantity of proof as shall suffice to remove from their minds every reasonable doubt that might be suggested, is to import into the trial of civil causes between party and party a rule which is appropriate only in the trial of issues between the state and a person charged with crime, and exposed to penal consequences if the verdict is against him."[18]

The American rule has also been stated on very high authority in this wise: "There seems to be at the present time no exception in the United States to the two rules, (1) that in criminal cases the jury must be satisfied beyond a reasonable doubt by the proof, and (2) that in civil cases they may decide upon the mere preponderance of evidence. The rule that when a criminal act is alleged in a civil suit the proof of the criminal act must satisfy the jury beyond a reasonable doubt, has now been abandoned in most of the states, and the same rule applied to these as to other civil cases."[19] It is interesting to examine some of the cases which adhere to the rule that a defense in a civil case where crime is charged must be established beyond a reasonable doubt. The case of Kane v. Hibernia Insurance Company, 9 Vroom. 441, is a case of that kind. The decision was rendered by the Supreme Court of New Jersey. It was an action on a policy of insurance against loss by fire. The defense was that the plaintiff willfully set fire to the insured property, and the court held that the defendant was bound to establish the defense beyond a reasonable doubt, and by the same degree and measure of proof that would be required to convict the plaintiff if tried on an indictment for the same offense. Woodhull, J., in reviewing the case said: "In regard to the reasonableness of the rule against which much has been said in the case just referred to, and in other cases, I remark that, whether applied to criminal or civil cases, the reason of the rule seems to me to be the same, and the rule itself rests upon precisely the same foundation, viz., that legal presumption in favor of innocence, a presumption which is not, as some seem to suppose, an arbitrary contrivance to screen the guilty when under indictment, but a conclusion of law drawn from general experience of human conduct, and designed to protect the innocent—a presumption of such potency that it can be overcome by nothing short of full and satisfactory proof—that is, by the highest measure of proof defined by the common law, as distinguished from that by mere preponderance of evidence. As the rule in question merely recognizes and gives effect to this universal presumption of law, I cannot think that it is either unreasonable or unjust."[20] Lord Chancellor Erskine held in a well known case that "a fact must be established by the same evidence, whether it is followed by criminal or civil consequence."[21]

In a New York case the court held that the same presumption against the commission of crime prevails in civil as in criminal cases, saying that, according to every rule of sound reasoning, such presumption ought to be invoked equally in favor of any person who makes a claim which can only be defeated by assuming that a crime has been committed.[22] And in another New Jersey case it was held

[17] Steph. Ev. art. 94.

[18] Ellis v. Buzzell, 60 Me. 209.

[19] 1 Greenl. Ev. sec. 13*a*, note (14th Ed. 1883). See also Allen v. Allen, 101 N. Y. 658, to the same effect.

[20] Kane v. Hibernia Ins. Co., 9 Vroom. 441, 20 Am. Rep. 409.

[21] Lord Melville's Case, 21 How. St. Tr. 764.

[22] Clayton v. Wardell, 5 Barb. 216, 217.

that, upon a bill for divorce on the ground of adultery, the complainant must not only show a decided preponderance of evidence in support of the charge, but must prove it to the satisfaction of the court beyond a reasonable doubt.[23] Still, the decided weight of the American decisions is in favor of the position that the preponderance of evidence is sufficient to establish the facts in any civil action. Just what is proof beyond a reasonable doubt in a criminal case is thus stated by Shaw, C. J., in the Dr. Webster case, *supra:* "Each fact necessary to the conclusion songht to be established, must be proved by competent evidence, beyond a reasonable doubt; all the facts must be consistent with each other, and with the main facts sought to be proved; and the circumstances taken together, must be of a conclusive nature, leading on the whole to a satisfactory conclusion, and producing in effect a reasonable and moral certainty that the accused, and no other person, committed the offense charged. The burden of proof is upon the prosecutor. All the presumptions of law, independent of evidence, are in favor of innocence; and every person is presumed to be innocent until he is proved guilty. If upon such proof there is reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal, for it is not sufficient to establish a probability, though a strong one, arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding, and satisfies the reason and judgment, of those who are bound to conscientiously upon it. This we take to be proof beyond reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether."[24]

And the same rule has been re-stated by the same court in a later case.[25] The Dr. Webster case, *supra*, is a leading American case in criminal jurisprudence. The opinion is exhaustive and travels the entire domain of circumstantial evidence. Its discussion of the doctrine of reasonable doubt is exceedingly luminous and leaves little to be desired upon that particular branch of the criminal law. The opinion is a law classic. One does not pursue his investigations of the doctrine of reasonable doubt far before he is confronted with the question of the presumption of innocence in criminal cases. Indeed, the two phrases, "presumption of innocence," and "proof beyond reasonable doubt," seem to be so closely related, that it is, practically, impossible to consider the one, without in some sense and degree, have in mind the other, also. What is "presumption of innocence?" The authorities are not all agreed. In the Dr. Webster case, *supra*, it is said that "all the presumptions of law, independent of evidence, are in favor of innocence." Here, then, it would appear that the "presumption of innocence" is not evidence. But Mr. Greenleaf, in his work on Evidence,[26] in discussing presumptive evidence, refers to this legal presumption of innocence, and says "it is to be regarded by the jury, in every case, as matter of evidence," and that the accused is entitled to the benefit of the same. It would seem, therefore, if Mr. Greenleaf's view is to prevail, that the presumption of innocence in criminal cases is in the nature of probative matter in favor of the accused. That, however, is not the purpose or scope of the presumption of innocence. The whole question has received an able consideration in a lecture by Professor Thayer, of Harvard Law School[27] provoked by what he believes to be the untenable exposition of the "presumption of innocence," in a case[28] before the Supreme Court of the United States.

In this case, White, J., speaking for the court, no dissenting opinion appearing, said: "The presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial on a criminal charge he must be acquitted unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.

[23] Berckmans v. Berckmans, 17 N. J. Eq. Rep. (2 C. E. Green), 453.
[24] Commonwealth v. Webster, 59 Mass. 295 (5 Cush.).
[25] Commonwealth v. Goodwin (Mass.), 14 Gray, 57.
[26] 1 Greenl. Ev. sec. 34.
[27] Thayer, Evidence at Common Law, Append. B.
[28] Coffin v. United States, 156 U. S. 432.

This presumption, on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn. * * * The fact that the presumption of innocence is recognized as a presumption of law, and is characterized by the civilians as *presumptio juris* demonstrates that it is evidence in favor of the accused; for in all systems of law, legal presumptions are treated as evidence giving rise to resulting proof to the extent of their legal efficacy. Concluding then that the presumption of innocence is evidence in favor of the accused, introduced by the law in his behalf, let us consider what is reasonable doubt.[29] The writer[30] criticising this view of "presumption of innocence" submits the following rational conclusions: "1. A presumption operates to relieve the party in whose favor it works from going forward in argument or evidence. 2. In that sense it is, temporarily, the substitute or equivalent for evidence. 3. It serves this purpose until the adversary has gone forward with his evidence. How much evidence shall be required from the adversary to meet the presumption, or, as it is variously expressed, to overcome or destroy it, is determined by no fixed rule. It may be merely enough to make it reasonable to require the other side to answer; it may be enough to make out a full *prima facie* case; and it may be a great weight of evidence, excluding all reasonable doubt. 4. A mere presumption involves no rule as to the weight of evidence necessary to meet it. 5. A presumption itself contributes no evidence, and has no probative quality. It is sometimes said that the presumption will tip the scale when the evidence is balanced. But, in truth, nothing tips the scale but evidence, and a presumption—being a legal rule or a legal conclusion—is not evidence. It may represent and spring from certain evidential facts; and these facts may be put in the scale. But that is not putting in the presumption itself."

It is quite apparent from what has already been said, that the undoubted weight of authority in this country, as well as what appears clearly to be the better reason, repudiates the application of the doctrine of reasonable doubt, in the trial of civil causes, no matter if the commission of a crime is in issue. And it is equally clear under the decisions that the application of the rule in the trial of criminal actions is uniformly and very rigidly adhered to and enforced. The consequences which follow a conviction under the criminal code have been deemed of so tremendous import to the accused, that no relaxation of the requirement of proof beyond a reasonable doubt has, for a moment, ever been entertained by our courts or our makers of the laws. And Mr. Bishop has said truly: "It is more for the interest of the government, in whose name and to promote whose interests criminal prosecutions are carried on, that a conviction, when there is no guilt should be avoided, than that it should be secured, when there is guilt."[31] The willingness with which our laws and our government will permit a guilty man to escape rather than that an innocent man should suffer legal punishment, however slight, has been and is the uniform policy of this country, and is the subject of favorable comment among civilized peoples. And by enforcing the rule of proof beyond reasonable doubt, it is exceedingly rare that an innocent man is convicted of crime in this country. The presumption of innocence is one of the theories of our criminal laws and tends to conserve the liberties of the citizen. In other words, accused of committing crime and proved guilty of the same, are widely different propositions, requiring radically different treatment. The presumption of innocence means that all men are to be regarded as good and upright citizens and free from blame, in the first instance. The law and the courts recognize this and it is just that this is so.[32]

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[29] This definition appears in another part of this article, in considering the meaning of reasonable doubt under the decisions. D. M.

[30] Prof. J. B. Thayer, in Appendix B, Title: "Presumption of Innocence in Criminal Cases," Thayer, Ev. at Com. Law.

[31] 1 Bish. Crim. Proc. sec. 1050.

[32] 3 Greenl. Ev. sec. 29, 1 *Id.* secs. 34, 35; 1 Jones, Ev. sec. 11; Thayer, Ev. Com. Law, Append. B, Title: "Presumption of Innocence in Criminal Cases."

BANKRUPTCY—PETITION BY ONE PARTNER—VOLUNTARY PROCEEDING.

IN RE CARLETON.

District Court, D. Massachusetts, April 24, 1902.

Under Bankr. Act 1898, § 5, providing that a partnership may be adjudged a bankrupt, and General Order No. 8, providing that any member of a partnership who refuses to join in a petition to have the

partnership declared bankrupt, shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and that notice of the filing of the petition shall be given to him, where, on the filing of a petition by one partner, a copy was duly served on the other partner, and he entered no appearance, and was defaulted, the proceeding should be deemed voluntary on the part of both partners as against a creditor who sought to intervene and contest on the ground that the firm was not insolvent.

LOWELL, D. J.: A petition was filed by Carleton setting out that he was a partner with Freeman in the firm of J. E. Carleton & Co., and that the partners were unable to pay their debts in full; that Carleton was ready to surrender "his and their" property for the benefit of their creditors, "and desire to obtain the benefit of the acts of congress relating to bankruptcy." No act of bankruptcy was alleged. Schedules A, B, C and D were appended and filled out. The petition followed form No. 2 as closely as might be, and was similar to that generally used in this district in like case. Pursuant to general order 8, Freeman was duly served with a copy of the petition. He entered no appearance within the time appointed, and was therefore defaulted. An attaching creditor seeks to intervene in order to contest the adjudication upon the ground that the firm was not insolvent, that Carleton was not a partner, etc. The history in the United States of voluntary petitions filed by one partner with intent to put the firm into bankruptcy appears to be this:

Section 14 of the act of 1841 provided: "That where two or more persons, who are partners in trade, become insolvent, an order may be made in the manner provided in this act, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, upon which order all the joint stock and property of the company, and also all the separate estate of each of the partners shall be taken, excepting such parts thereof as are herein exempted." 5 Stat. 448.

This enabled one partner to put all the members of his firm into bankruptcy, provided all were insolvent. No specific provision was made for proceedings in which one partner asserted and the other denied insolvency; but, so far as outsiders were concerned, the petition was treated as a voluntary one. See Chandler, Bankr. Law, pp. 9, 64; *Ex parte* Hall, Fed Cas. No. 5,919; *Ex parte* Hull, Fed. Cas. No. 6,855; Bank v. Johnson, Fed. Cas. No. 133; *Ex parte* Galbraith, Fed. Cas. No. 5,187.

Section 36 of the act of 1867 provided: "That where two or more persons who are partners in trade shall be adjudged bankrupt, either on the petition of such partners, or any one of them, or on the petition of any creditor of the partners, a warrant shall issue in the manner provided by this act, upon which all the joint stock and property of the copartnership, and also all the separate estate of each of the partners, shall be taken excepting such parts thereof as are hereinbefore excepted."

This section, though much resembling section 14 of the act of 1841, yet differed from it in this: Instead of authorizing one partner to put all the members of the firm into bankruptcy by a voluntary petition, it provided what should happen after all had been adjudged bankrupt upon the petition of one partner or of a creditor. General order 18 dealt with the matter further, and provided, substantially, as in the existing general order 8, that: "In case one or more members of a copartnership refuse to join in a petition to have the firm declared bankrupt, the parties refusing shall be entitled to resist the prayer of the petition in the same manner as if the petition had been filed by a creditor of the partnership, and notice of the filing of the petition shall be given to him in the same manner as provided by law and by these rules in the case of a debtor petitioned against; and he shall have the right to appear at the time fixed by the court for the hearing of the petition, and to make proof, if he can, that the copartnership is not insolvent, or has not committed an act of bankruptcy and to take all other defenses which any debtor proceeded against is entitled to take by the provisions of the act."

Under this act and general order it was held by many courts that a petition by one partner to put the firm into bankruptcy need not allege an act of bankruptcy; an allegation of insolvency, as in the case of a voluntary petition, was sufficient. *In re* Stowers, Fed. Cas. No. 13,516; *In re* Noonan, Fed. Cas. No. 10,292; *In re* Hathorn, Fed. Cas. No. 6,214; *In re* Penn, Fed. Cas. No. 9,927. This was said in *Re* Gorham, Fed. Cas. No. 5,624, and in *Re* Grady, Fed. Cas. No. 5,654. It was assumed, more or less distinctly, in *Re* Bennett, Fed. Cas. No. 1,314; *Id.* 1,315; *Re* Prankard, Fed. Cas. No. 11,333; *Re* Moore, Fed. Cas. No. 9,750; *Re* Little, Fed. Cas. No. 8,390; *Re* Smith (D. C.), 16 Fed. Rep. 435. An examination of the files shows that this was the firmly-settled practice in this court under the act of 1867, and that to this extent the petition of one partner was deemed a voluntary proceeding, even as against a non-joining partner. In some other respects the proceedings were treated as voluntary. *In re* Wilson, 2 Low. 453, Fed. Cas. No. 17,784. Yet in Metsker v. Bonebrake, 108 U. S. 66, 2 Sup. Ct. Rep. 351, 27 L. Ed. 654, the supreme court held that a case in which one partner petitioned and the other partner came in and confessed himself bankrupt was a case of "compulsory or involuntary bankruptcy," within the provisions of St. 1874, ch. 390, § 10 (18 Stat. 180), and Rev. St. § 5128, dealing with preferences, Mr. Justice Miller said:

"We do not doubt that Metsker's was a case of involuntary or compulsory bankruptcy within the meaning of this amendment. The distinction intended by this language is clearly between the cases in which the bankrupt himself

and of his own volition initiates proceedings in bankruptcy and those in which they are commenced by some one else against him. In the one case it is voluntary, and in the other compulsory. It is not a voluntary bankruptcy if the man is forced into it against his will by his partner any more than by any one else; and it is compulsory and involuntary if he refuses to join in such case, and is forced into it, as much as in any other enforced bankruptcy." Pages 70, 71, 108 U. S., page 353, 2 Sup. Ct. Rep. 27 L. Ed. 654.

Section 5 of the act of 1898 provides that "a partnership, during the continuation of the partnership business, or after its dissolution and before the final settlement thereof, may be adjudged a bankrupt." Nothing is said in the act concerning the method or methods by which a partnership may be adjudged bankrupt either by voluntary or involuntary petition. For direction in this matter, we must turn to general order 8, which is, in substance, general order 18 of the act of 1867. Taking the act and the general order and form No. 2 together, it appears to me safest to assume that the law regarding partnership petitions is substantially the same as it was under the act of 1867. Notwithstanding the decision of the supreme court in Metsker v. Bonebrake, it appears to me that this court is not compelled to hold, either under the act of 1867 and general order 18, or under the act of 1898 and general order 8, that this petition is so far involuntary as to permit a creditor of the firm to intervene in order to resist adjudication. See *In re* Murray (D. C.), 96 Fed. Rep. 600. As to the petitioner, these proceedings are purely voluntary. As to him a creditor has no more right to intervene than in the case of any other voluntary petition. As to the non-joining partner, the proceedings are in some sense involuntary. As to intervention by a creditor, it is most convenient, and most consistent with justice and the general scheme of the act, to hold that the right "to make all defenses which any debtor proceeded against has a right to make," is confined to the non-joining partner. If he makes no objection, then, so far as adjudication is concerned, the petition is to be treated generally as if it were altogether voluntary. Had this been an ordinary voluntary petition by both partners, the creditor could not have intervened to contest the adjudication. If partners are willing to be adjudged bankrupt, whether on the petition of one or on that of all of them, they are to have their way.

Difficulties may arise in construing either act. For example, the court may have to consider what defenses are now open to the non-joining partner. Under the act of 1867 as has just been stated, the petition needed to allege no more than insolvency, and the non-joining partner might take issue on the alleged insolvency. Under section 11 of the act of 1867, insolvency was necessary to support a voluntary petition. There is no such requirement in the act of 1898, though forms Nos. 1 and 2 both require the voluntary bankrupt to set out his inability to pay his debts. This inability may, perhaps, be taken to represent insolvency, though inability to pay debts is not the precise equivalent of insolvency as defined in section 1 of the act of 1898. Under the act of 1867 it was suggested in some cases that one partner might put the firm into bankruptcy by a petition alleging either insolvency without an act of bankruptcy or an act of bankruptcy without insolvency. It would be somewhat difficult to apply this theory to the act of 1898, and the matter is stated here only to show that the difficulties involved in the conclusion here reached have not been overlooked

It cannot be pretended, indeed, that the result thus reached is in all respects satisfactory. The control of a partnership is the most difficult and complicated matter with which a court of bankruptcy has to deal, and no scheme of administration has yet been devised at once perfectly logical and perfectly workable. See *In re* Wilcox (D.C.), 94 Fed. Rep. 84. For example: (1) To deal with the joint estate in bankruptcy without at the same time dealing with the separate estate of all the partners, and (2) to refuse to deal with the joint estate in bankruptcy unless the separate estate of all the partners is bought under the same commission, are courses alike so difficult that neither can be followed to its last logical conclusion. A partnership can be treated neither as an entity altogether separate from the partners, nor as merely the sum of them. The case at bar illustrates this proposition.

The attaching creditor further contends that, even if this petition be treated as voluntary, yet he is entitled to intervene. The question thus presented amounts to this: Can a creditor intervene to oppose an adjudication under an ordinary voluntary petition by setting up that the petitioner is not insolvent? This is not a case in which a person manifestly able to pay all his debts files a petition in bankruptcy for the purpose of embarrassing a particular creditor. In an unreported case of that sort this court has held that the creditor may have the adjudication set aside on the ground that the whole proceeding is a fraud upon the act, and an abuse of process. To permit a creditor, in an ordinary case, to resist adjudication on a voluntary petition, or to have an adjudication once made on such petition set aside upon the ground that the bankrupt was solvent, would introduce endless confusion.

Petition to intervene dismissed.

NOTE.—*The Effect of a Voluntary or Involuntary Adjudication in Bankruptcy of a Partnership, or of the Individual Members Thereof.*—As intimated by the court in the principal case, the partnership frequently occasions much difficulty and perplexity in the construction and application of the bankrupt act. Not because of any defect in the bankrupt act itself, but because of the difficulty of harmonizing it with the theory of the partnership. As a result much disagreement among the authorities exists on many of the phases of the subject-matter before us.

Involuntary Adjudication.—It must be remembered that a partnership is a distinct legal entity, and proceedings in bankruptcy by or against one partner does not of necessity involve the other. A firm, as such, may be a bankrupt, and the individuals comprising such firm solvent, and not bankrupt. *In re* Sanderlin 6 Am. B. Rep. 385; *In re* Meyers, 98 Fed. Rep. 976; *In re* Barden, 4 Am. B. Rep. 31; Strauss v. Hooper, 105 Fed. Rep. 590. But where a petition in involuntary bankruptcy charges that the individual members of a firm, sought to be declared a bankrupt, as well as the partnership, made a general assignment for the benefit of creditors, the adjudication should embrace both the firm and the individual partners. Green River Deposit Bank v. Craig Bros., 6 Am. B. Rep. 381. But whether the individual members of a firm can be adjudicated bankrupts in an involuntary proceeding against the partnership alone is extremely doubtful. In the case of *Re* Meyer, 98 Fed. Rep. 976, the court denied that any power existed to make such an order, arguing that "as the commission of an act of bankruptcy is indispensable to jurisdiction in an involuntary proceeding, the individual members cannot be adjudged bankrupts in such a proceeding, who have not committed, or been participants in committing one of the enumerated acts." The court in the case of *In re* Stokes, 6 Am. B. Rep. 262, in remarks which were purely *obiter dicta*, expresses its dissent from this doctrine. What are considered acts of bankruptcy sufficient to adjudge a partnership bankrupt is not always easy to answer. Would payment of an individual debt by one partner out of the partnership property constitute such an act? The answer must certainly be in the affirmative where the firm is at the time of the payment insolvent and has not sufficient money remaining to pay the partnership debts. *In re* Gillette, 5 Am. B. Rep. 119. So also, where one of the partners made a general assignment for the benefit of creditors. Chemical National Bank v. Meyer, 1 Am. B. Rep. 565.

In bringing an involuntary petition two questions arise—where may the proceeding be brought and what must the petition show? A proceeding for involuntary bankruptcy is authorized, under the present act, to be brought in any district wherein any one of the partners has had his residence, domicile or place of business long enough to support the jurisdiction of the court. The petition in such case must also show whether any of he individual partners are solvent. "No doubt" says Brown, J., a firm is sometimes said to be insolvent when only a deficiency of joint assets is meant. But as each partner is liable *in solido* for the debts of the company, so that they are debts of each individual member as much and as truly as they are debts of the firm, a partnership cannot with strictness be said to be insolvent while any one of the partners is able to pay all the firm's liabilities." *In re* Blair, 3 Am. B. R. 588.

Voluntary Proceedings. — The prevailing weight of authority sustains the principle enunciated by the case of *In re* Meyer, already cited, that the intent of the bankrupt act is to treat a partnership as an entity entirely distinct from the individuals composing it. *In re* Meyer, 98 Fed. Rep. 976; *In re* Barden, 101 Fed. Rep. 555, 4 Am. B. Rep. 31; *In re* Farley & Co. 8 Am. B. Rep. 266. Thus, in the case of *In re* Barden, it was held that where a petition is filed by a partnership to have the firm adjudicated a bankrupt, and also petitions by the individual members of the firm, each petition and the accompanying schedule constitute separate and distinct cases, and the referees and trustee are entitled to separate fees in each case Following out this principle, therefore, it necessarily results that where the two partners of a firm, which files a voluntary petition, desire to be adjudicated bankrupts individually, they should each file an individual petition, and in such case there should be three orders of adjudication and of reference, and in all other proceedings the idea of three separate cases should be carried out. Several cases dissent from the rule announced in the Barden case holding the proceedings in regard to the partnership and the individual partners to be practically one proceeding, and that therefore only one fee should be allowed. *In re* Langslow, 98 Fed. Rep. 869; *In re* Gay 98 Fed. Rep. 870.

The distinction between voluntary and involuntary proceedings is not always clear. The general rule announced by the authorities is to the effect that the petition on behalf of part of the members of a partnership is to be classed as a voluntary proceeding, unless the non-joining partners upon notification make defense, in which case the proceedings become involuntary and subject to the regulations thereof as provided in the bankrupt act. *In re* Murray, 3 Am. B. Rep. 601. This case seems opposed to the rule laid down in the principal case, and was based on the decision of Justice Miller in the case of Metsker v. Bonebrake, 108 U. S. 66, cited and quoted from by the court in the principal case. Before an adjudication can be made, however, on a voluntary petition signed by only a part of the members of a copartnership, the member or members not joining must be given notice of the petition before the firm can be adjudged bankrupt. *In re* Murray, 3 Am. B. Rep. 90. A dissolved copartnership may be adjudged bankrupt on the petition of one of the partners where its debts are outlawed. *In re* Levy, 2 Am. B. Rep. 21.

JETSAM AND FLOTSAM.

POWER OF STATE LEGISLATURES TO FIX THE MINIMUM AMOUNT OF WAGES TO COAL MINERS.

In a recent interview in relation to the controversy between the corporations in the coal combine and the mine workers of the anthracite region of Pennsylvania, it was asserted by the undersigned that the legislature of that state has the power to classify the mines with reference to the depth and thickness of the coal veins and fix schedules of reasonable minimum prices per ton for mining coal, and a suitable penalty against any operator who may make contracts with miners for less than such prices. While it is generally admitted that the state, in order to secure the steady operation of the mines and a sufficient supply of coal for the public has the power to take the mines themselves, or a portion of them, upon due compensation, under the power of eminent domain, an honest doubt has been expressed in some quarters as to the power of the legislature to control the liberty or freedom of contracting.

Thus, the CENTRAL LAW JOURNAL of St. Louis, in its last number says: "The other suggestion for the purchase of the mines by the state, we believe to be the only practicable solution of those unfortunate conditions which periodically break out in what are known as strikes. The cupidity and selfishness of the mine operators is aggravated by the fact of their illegal combination, giving them an unfair advantage over their employees in the price of labor, and over the public in the price of the necessary commodity which they control. In such case the condemnation

of the coal mines by the state, to be managed for the benefit of the public, is clearly a public use justifying its exercise under the power of eminent domain." But the JOURNAL in the same article says: "The suggestion that the legislature has the power to fix the minimum amount of wages to be paid to coal miners, we gravely doubt. If that does not violate the citizen's liberty of contract we cannot perceive how such right can ever be violated. The right of individuals to contract cannot be limited by arbitrary legislation which rests on no reason on which it can be defended."

Now it is the purpose of this communication to show from the decisions of the highest court in the land—the final interpreter of constitutional provisions—the Supreme Court of the United States that the right of individuals, and especially of corporations, to contract can be limited by legislation, which rests on, and can be defended by good reasons, and that, accordingly, many enactments of state legislatures and of congress similar to the one proposed for requiring the mining corporations to be reasonable in making their contracts with the mine workers have been sustained and held not to be in conflict with any constitutional provisions relating to contracts.

It is immaterial in this discussion whether the power of contracting is an incident of the right of liberty or an incident of the right of property, since in either view it is protected by the same constitutional provisions against federal and state action. But it is well to keep in mind certain important distinctions between a citizen or natural person and a corporation or artificial person. It has been repeatedly held by the Supreme Court of the United States that while a corporation is a person it is not a citizen within the meaning of the fourteenth amendment. Unlike the citizen, a corporation has no natural or original rights or powers. A corporation is an artificial person created by the law and endowed with only such capacity or powers as may be conferred upon it by the act of incorporation. No lawyer has ever contended that the state in granting a special privilege or immunity to a corporation has not a right to prescribe the conditions upon which such privilege or immunity shall be enjoyed. And whenever any such privilege or immunity, capacity or power is abused by the corporation, the legislature, in order to prevent such abuse in future transactions, can modify and restrict the privilege or capacity, under that clause of the constitution of Pennsylvania (also in the constitutions of several of the states), which provides that "no law making irrevocable any grant of special privileges or immunities shall be passed." And even without this clause of the constitution the state has always had the right to enact from time to time reasonable laws for preventing in the future an abuse of any privilege or franchise conferred upon a corporation of its own creation.

In Waters-Pierce Company v. Texas, 177 U. S., p. 43, the supreme court says: "A corporation is the creature of the law and none of its powers are original. They are precisely what the incorporating act has made them and can only be exerted in the manner which that act authorizes. In other words, the state prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the state's control." See also Chicago Life Ins. Co. v. Needles, 113 U. S. 579.

There are some other principles to be considered in connection with the fifth and fourteenth amendments which are just as applicable to the citizen as to a corporation. The unrestrained, wrongful exercise of natural liberty is not a privilege or immunity of a citizen of the United States. Governments are instituted among civilized men for the prevention of wrongs. Civilized governments will not allow license to go unrestrained and do grevious and far-reaching wrongs under the name of natural liberty. "We must distinguish the natural liberty, which has no limits but the strength of the individual, from civil liberty, which is limited by the general will for the common good." In the language of the court in Orient Insurance Company v. Daggs, 172 U. S. 557, 566, "It would be idle and trite to say that no right is absolute. *Sicutere tuo ut alienum non laedas* is of universal and pervading obligation. It is a condition upon which all property is held. Its application to particular conditions must necessarily be within the reasonable discretion of the legislative powers. When such discretion is exercised in a given case by means appropriate and which are reasonable not oppressive or discriminatory, it is not subject fo constitutional objection." Or as Mr. Chief Justice Fuller says: "The right to contract is not absolute, but may be subjected to the restraints demanded by the safety and welfare of the state." St. Louis Iron Mountain, etc. Railway v. Paul, 173 U. S. 404, 409.

The weakness of the objections based upon the fifth and fourteenth amendments lies in the assumptions, (1) that there is no distinction between prohibition and regulation, and (2) that a law preventing any and all parties who may engage in operating coal mines from contracting with miners for unreasonably low wages would not be a general law.

Take notice that the words "deprived" and "deprive" are used in the fifth and fourteenth amendments. "No person shall be deprived of life, liberty or property without due process of law," "nor shall any state deprive any person of life, liberty or property without due process of law." Regulation by congress or the state is not deprivation: The proposed legislation would not take away from either the mine operator or the mine worker the power to make contracts whether this power is to be considered an incident of the right of liberty or an incident of the right of property. Such legislation would simply regulate the exercise of this power of contracting so as to prevent extortion when the power is exercised between the mine operator and the mine worker and the subject-matter is labor in mining coal. It would not destroy or take away the power of contracting with any one, but would simply cut off from it the vicious growth, the exercise of extortion, leaving the power of contracting in the full enjoyment of all its proper functions. Indeed, government would be of no account if it could not regulate the enjoyment of life, liberty and property so as to prevent such evils as in their hurtful excesses or malignant growths endanger the peace and good order of society, the safety and welfare of the people.

There remains to be considered the last clause of the fourteenth amendment, which provides that "no state shall deny to any person the equal protection of the laws." In Hawthorne v. People, 109 Ill. p. 311, the court says: "A law is general, not because it embraces all of the governed, but that it may, from its terms, when many are embraced in its provisions, and all others may be when they occupy the position of those who are embraced."

In view of this clear and sound definition of "general law" there is no doubt as to the constitutionality of a multitude of laws that are general in their scope, but partial in their operation, for the simple reason

that while all persons may, all persons do not, place themselves within the range of their operation. We may not now belong to the class of money-loaners, but we may some day join that class of contractors, and then we shall be within the range of the operation of the interest law regulating the power of contracting, and if we take usury it will be useless for us to claim that the law forbidding usury is not a general law. We may not be land-sellers or land-buyers, but if we sell or buy land we are subject to the statute of frauds and cannot enforce the contract unless it is made in writing as required by the statute in such cases, and yet the law is general. We may not be the owners of land, but if we become such and make contracts for building houses thereon, we do so subject to all the restrictions and burdens of the mechanic's lien law imposed by the legislature for the protection of contractors, material men, subcontractors and workmen, and no one claims that these laws are not general and constitutional. Mining corporations as well as railroad corporations, insurance companies, building and loan associations, etc., require a separate body of laws for the control of their operations. And there is not one of these classes of corporations that is not restricted in some directions as to the power of contracting. A railroad corporation, for instance, cannot buy farm land for farming purposes. Nor can any corporation of either of the other classes above mentioned. It is not necessary to dwell longer on the clause of the fourteenth amendment providing for "the protection of the laws," in view of the decisions of the Supreme Court of the United States. In Magoun v. Illinois Trust and Savings Bank, 170 U. S. 283, the court says: "The state may distinguish, select and classify objects of legislation and necessarily the power must have a wide range of discretion."

But while corporations have no original rights or capacities and are subject to legislative control it is suggested that the proposed legislation would violate the miners—the citizens' liberty or freedom of contract. What is the natural person's original liberty or freedom to contract? It is nothing more than the liberty of freedom to contract with natural persons. And when, in addition to this liberty or freedom of the citizen, he acquires the capacity of power to make contracts with a corporation, he, as well as the corporation with whom he may contract, is subject to the legislative restrictions accompanying the capacity or power of the corporation. The capacity or power of a citizen to sell land to a corporation is no greater than that of a corporation to buy land. The natural person may be able to hold his own in making contracts with natural persons, but when the state, organized for the protection of human beings, creates artificial, unhuman beings, and gives them the capacity to grow into such monster corporations as now master the anthracite region, it becomes the duty of the state to put into the hands of the citizen some legal weapon that will aid and protect him in his struggle for a reasonable living wage with these creatures of the state itself.

The proposed legislation for establishing reasonable minimum prices per ton for mining coal in the anthracite region of Pennsylvania is similar to the legislation of Illinois establishing reasonable maximum rates of charges for transportation on the railroads in that state. It is also confidently believed that any doubt as to the constitutionality of such legislation (especially in its application to corporations in Pennsylvania), will be removed upon the consideration or careful re-examination of the opinions of the Supreme Court of the United States in the following cases involving the validity of legislation in restraint of the power, liberty or freedom of making contracts.

In the case of Munn v. Illinois, 94 U. S. 113, the Supreme Court of the United States reaffirmed the doctrine announced by Lord Chief Justice Hale more than two hundred years ago that when private property is "affected with a public interest" it is subject to governmental control so as to prevent imposition and extortion. In that case it was held that the warehouse business in the city of Chicago carried on by Munn & Scott, a mere partnership, was a business "affected with a public interest," and that the limitation by legislative enactments of the rate of charge for warehouse services was constitutional. The court says: "Under these powers (inherent in every sovereignty) the government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. To this day statutes are to be found in many of the states upon some or all of these subjects, and we think it has never yet been successfully contended that such legislation came within any of the constitutional prohibitions against interference with private property."

In Frisbie v. United States, 157 U. S. 160, it was held that the act of congress making it a misdemeanor for an attorney or other person prosecuting a claim for a pension to demand or receive a greater fee than $10 for his services, was not unconstitutional as an interference with the citizen's liberty or contract. The court says: "A second objection * * * is that the act under which the indictment was found is unconstitutional because interfering with the price of labor and the freedom of contract. This objection is also untenable. While it may be conceded that, generally speaking, among the inalienable rights of the citizen is that of the liberty of contract, yet such liberty is not absolute and universal. It is within the undoubted powers of government to restrain some individuals from all contracts as well as all individuals from some contracts. It may deny to all the right to contract for the purchase or sale of lottery tickets; to the minor the right to assume any obligations except for the necessaries of existence; to the common carrier the power to make any contract releasing himself from negligence, and indeed, may restrain all engaged in any employment from any contract in the course of that employment which is against public policy. The possession of this power by government in no manner conflicts with the proposition that, generally speaking, every citizen has a right freely to contract for the price of his labor, services or property.

In Holden v. Hardy, 169 U. S. 366, it was held that a statute of Utah providing that "the period of employment of workingmen in all underground mines or workings shall be eight hours per day, except in cases of emergency, where life or property are in imminent danger," does not violate the provisions of the fourteenth amendment by abridging the privileges or immunities of its citizens, or by depriving them of their property, or by denying to them the equal protection of the laws. In this case the court cites with approbation the following from Chief Jus-

tice Shaw: "Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient." And thereupon the court added: "This power legitimately exercised can neither be limited by contract nor bartered away." It is a matter that should be considered and well pondered over by the magnates of the "coal combine", that in this same case the Supreme Court of the United States says:

"The legislature has also recognized the fact, which the experience of legislators in many states has corroborated, that the proprietors of these establishments and their operatives do not stand upon an equality, and that their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employees, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, favorably exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide and the legislature may properly interpose its authority.

In Knoxville Iron Company v. Harbison, 183 U. S. 13, it was held that an act of the legislature of the state of Tennessee, requiring the redemption in cash of store orders or other evidences of indebtedness issued by employees in payment of wages due to employees, does not conflict with any provisions of the constitution of the United States relating to contracts.

In St. Louis, Iron Mountain, etc. Railway v. Paul, 173 U. S. 404, a judgment of the Supreme Court of Arkansas, sustaining the validity of an act of the legislature of that state which provided that whenever any corporation or person engaged in operating a railroad should discharge, with or without cause, any employee or servant, the unpaid wages of any such servant then earned should become due and payable on the date of such discharge without abatement or deduction, was affirmed. It is true that stress was laid in the opinion in that case on the fact that, in the constitution of the state, the power to amend corporation charters was reserved to the state, and it is asserted that no such power exists in the present case. But it is also true that, inasmuch as the right to contract is not absolute in respect to every matter, but may be subjected to the restraints demanded by the safety and welfare of the state and its inhabitants, the police power of the state may, within defined limitations, extend over corporations outside of and regardless of the power to amend charters. Atchison, Topeka & Santa Fe Railroad v. Matthews, 174 U. S. 96.

In view of these decisions can there any longer be any reasonable doubt as to the constitutional power of the state of Pennsylvania to enact such legislation, even though it may interfere with the power, liberty or freedom of the corporations in the "coal combine," to extort from the miners contracts for their labor at less than a living wage. It is well to remember the language of Chief Justice Fuller quoted in another connection: "The right to contract is not absolute, but may be subjected to the restraint demanded by the safety and welfare of the state." Now the question arises: Does the peace and good order, the safety and welfare of the state of Pennsylvania and the inhabitants of the anthracite coal region demand such legislation? In view of the long train of evils following the present struggle between the mine operators and mine workers over the price of wages, would not the proposed legislation come strictly within the so-called, but never closely defined, police powers of the state? Would not such legislation be as clearly within the police powers as the laws prohibiting or restricting the sale of intoxicating liquors or laws making illegal contracts for the purchase of "future delivery" cotton or grain?

The corporation arbitrarily fix the price they will give for labor, and will not listen to proffers by the miners for compromise. The idle miners ought not to molest or use any violence toward other miners from any quarter. They ought not to insult or throw stones at the troops ordered to the mines by the state authorities on the demand of the corporations. Sooner than do either of these things the one hundred and forty-seven thousand miners of the anthracite region should go back to work in the mines at the arbitrary prices fixed by the corporations or else abandon the benefit of all the special skill they have acquired in mining hard coal and go away with their families to other parts of the state or country. But some men at the risk of law and bayonets and sharpshooters will sooner steal food than starve to death. And as men of the brighest intellect when they become hard drinkers are led on step by step from the commission of one crime to that of another, so we find that a disagreement as to wages for mining coal leads to strikes, and strikes of any considerable duration are always followed by want and destitution, by mobs and murder. In the language of the Supreme Court of Colorado 23 Col. 507. "While it is difficult to define the boundaries of the police power it admitedly extends to the protection of the lives, health and property of the citizens and the preservation of good order and the public morals. We may properly take cognizance of the fact that the most serious disturbances which have occurred in this country for the last twenty-five years have grown out of controversies between employer and employee. No one doubts the authority or questions the duty of the state to interfere with such force as may be necessary to repress such disturbances and maintain the public peace and tranquility; and as well may the state provide in advance against certain kinds of fraud and oppression which leads to these outbreaks."

The mine operator has no moral right to extort from the mine worker his labor at less than a reasonable price. The mine operator in the "coal combine" of the anthracite region is strong, very strong, but "the strongest is never strong enough to be always master, unless he transforms his strength into right and obedience to duty."

R. M. BENJAMIN.

HUMORS OF THE LAW.

A New Hampshire judge has in his possession the following letter sent to him by an old farmer who had been notified that he had been drawn as a juror for a certain term of court:

"Deer Jedge: I got your letter tellin' me to come to manchester an' do dooty on the joory an i rite you these fue lines to let you know that you'll have to git some one else for it ain't so that I kin leave home now. I got to do some butcherin' an' sort over a lot of apples just about the time the joory will be settin' in your court. Si Jackman of this town says that he would as soon as not go, fer he ain't nothin' else to do jess now

so you better send fer him. I hate the worst way not to oblige you but it ain't so I kin at present. Ennyhow, I ain't much on the law, never havin' been a jooryman 'ceptin' when old Bud Stiles got killed by the cars here some years ago when I was one that set on the boody with the koroner. So you better send fer Si Jackman, for he has got some kin in manchester he wants to vissit ennyhow, an' he'd be willin' to go fer his car fare there an' back. Ancer back if you want Si."—*Lippincott's.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCOUNT—Laches.—A delay of 20 years in bringing suit for an accounting held laches, barring the suit. — Tozier v. Brown, Pa., 51 Atl. Rep. 998.

2. ADVERSE POSSESSION — Color of Title.— A deed to land, executed on a foreclosure sale, which is regular and valid on its face, though in fact voidable, constitutes color of title; and possession thereunder for seven years gives the grantee good title, as against the mortgagor or those claiming through him, under the Arkansas statutes.— H. B. Claflin Co. v. Middlesex Banking Co., U. S. C. C., E. D. Ark., 113 Fed. Rep. 958.

3. ADVERSE POSSESSION— Ejectment.—The defendant in ejectment cannot, under the statute, set up the three or five year statute of limitations, as giving title by adverse possession, as against his own deed, under which plaintiff claims. — Goldman v. Sotelo, Ariz., 68 Pac. Rep. 558.

4. APPEAL AND ERROR — Assignment of Error. — An assignment of error that a judgment was contrary to law without specifying wherein, raises only the question whether the judgment follows the pleadings. — De Mund Lumber Co. v. Stilwell, Ariz., 60 Pac. Rep. 548.

5. APPEAL AND ERROR— Construction of Decree. — A decree dismissing a bill upon a general demurrer thereto must be presumed to have been passed upon the merits, and not for want of jurisdiction, in the absence of any statement therein to the contrary.—Bradford Belting Co. v. Kisinger-Ison Co., U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 811.

6. APPEAL AND ERROR — Failure to State Cause of Action.—Where an intervener's petition does not state facts constituting a cause of action, and the intervener obtains judgment and appeals, the supreme court will render a judgment of dismissal, which should have been rendered below. — Iodence v. Peters, Neb., 89 N. W. Rep. 104f.

7. APPEAL AND ERROR—Interlocutory Decree.— A decree sustaining a demurrer to intervener's petition, with leave to amend, is an interlocutory decree, from which no appeal lies. — Walker v. National Guaranty Loan & Trust Co., Ala., 31 South. Rep. 802.

8. APPEAL AND ERROR—Jurisdiction Supreme Court.— Where the rental value of land in forcible detainer exceeds $100, that amount is the value in controversy. — Towle v. Weise, Kan., 68 Pac. Rep. 637.

9. APPEAL AND ERROR—Justice of the Peace.— In preparing bill of exceptions from ruling of a justice, pleadings, motions, evidence, decisions, and exceptions, and a certified copy of a bill of exceptions, constitute a reviewable record. — Towle v. Weise, Kan., 68 Pac. Rep. 637.

10. APPEAL AND ERROR—Mandamus. — A writ of error from a judgment refusing a peremptory writ of *mandamus* will be dismissed, where nothing of practical benefit to plaintiff in error can be accomplished by a decision of the question involved. — Alabama Coal Co. v. Bowden, Ala., 31 South. Rep. 820.

11. APPEAL AND ERROR—Partition Suit.—An interlocutory judgment and an order of reference in a partition suit, where there was a mistrial, reversed and vacated on account of lapse of time since the decision, instead of the case being referred back for a proper decision.— Levine v. Goldsmith, 75 N. Y. Supp. 706.

12. APPEARANCE—Jurisdiction.—Where defendant appears specially to question the jurisdiction, if he includes some ground recognizing the jurisdiction of the court, it amounts to a general appearance, though it purports to be made in pursuance to a special appearance.—Dudley v. White, Fla., 31 South. Rep. 930.

13. ARMY AND NAVY— Court Martial. — Proof that a court-martial was legally convened by an officer, that the officers upon it were of those whom he was authorized to detail for that purpose, that the court was vested with power to try the person and the offense charged, and that its sentence was in conformity to the statute, was indispensable to the validity of its judgment. — Demming v. McClaughry, U. S. C. C. of App., Eighth Circuit, 113 Fed. Rep. 639.

14. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Attaching Creditors.—An assignment for the benefit of creditors, which includes only a part of the assignor's property and is made for the benefit of a portion only of his creditors, is void as to attaching creditors, under Rev. St. § 2307.— H. B. Claflin Co. v. Harrison, Fla., 31 South. Rep. 818.

15. ASSIGNMENTS FOR BENEFIT OF CREDITORS—Failure of Assignee to Qualify.—Where a trust has been created by an assignment for the benefit of creditors, a court of equity will not permit it to fail because the assignee fails to qualify as required by the laws of the state, but will either appoint a new trustee or permit the beneficiaries to maintain a bill to execute the trust. — H. B. Claflin Co. v. Middlesex Banking Co., U. S. C. C., E. D. Ark., 113 Fed. Rep. 958.

16. ATTACHMENT—Death of Defendant. — Under Rev. St. pars. 1117, 1119, 1176, real estate attached before the owner's death is not subject to sale under the attachment after his death, the claim not being waived as to other property; but it is a prior claim against the land if sold for death.—Wartman v. Pecka, Ariz., 68 Pac. Rep. 534.

17. ATTACHMENT— Issues.— The issues in a claim proceeding in attachment are confined to the specific property embraced in the claim affidavit and bond.— H. B. Claflin Co. v. Harrison, Fla., 31 South. Rep. 818.

18. ATTORNEY AND CLIENT—Note Given for Converted Money. — Where an attorney, who has collected and converted to his own use money belonging to his client, gives his note for the amount, which the client accepts, the relation between them is thereby changed to debtor and creditor, and payment cannot be enforced by order of the court on summary application.—*In re* Neville, 75 N. Y. Supp. 588.

19. ATTORNEY AND CLIENT — Warrant of Attorney.—A warrant of attorney is an instrument authorizing an

attorney at law to appear in behalf of its maker or confess judgment against him.—Treat v. Tolman, U. S. C. C. of App., Second Circuit, 113 Fed. Rep. 892.

20. BANKRUPTCY — Involuntary Proceedings. — The pendency of involuntary proceedings, in which no hearing has been had or action taken does not deprive the defendant therein of his right to file a voluntary petition and have an adjudication thereon; but the court in such case, in the exercise of its equity powers, will stay proceedings on the creditors' petition and protect their rights by such orders as may be necessary.—*In re* Stegar, U. S. D. C., N. D. Ala., 113 Fed. Rep. 978.

21. BANKRUPTCY— Liens.— Bankr. Act 1898, § 67f, does not invalidate lien obtained by levy of attachment more than four months prior to bankruptcy proceedings, though dependent for enforcement on a judgment obtained within four months.—*In re* Beaver Coat Co., U. S. C. C. of App., Ninth Circuit, 113 Fed. Rep. 889.

22. BANKRUPTCY — Priorities. — Manufacturer, though having had lien on goods sold to bankrupt, held, nevertheless, not entitled to priority of payment out of the funds in the trustee's hands, produced by a receiver's sale of all the bankrupt's property. — *In re* Klapholz, U. S. D. C., E. D. Pa., 113 Fed. Rep. 1002.

23. BANKRUPTCY— Probable Claims. — Where a claim against an alleged bankrupt is based entirely upon a written contract, and some parts of the demand are confessedly unliquidated, it must all be treated as a single unliquidated claim.—*In re* Big Meadows Gas Co., U. S. D. C., W. D. Pa., 113 Fed. Rep. 974.

24. BANKRUPTCY—Social Club.—An incorporated club, whose principal object is social intercourse, any business conducted by it being merely incidental, is not "engaged principally in trading," and is not the subject of involuntary bankruptcy. — *In re* Fulton Club, U. S. D. C., N. D. Ga., 113 Fed. Rep. 997.

25. BANKRUPTCY— Vacating Adjudication. — An order sustaining a demurrer to a petition filed for the purpose of vacating an adjudication in bankruptcy is not a judgment from which an appeal will lie, under the provisions of Bankr. Act 1898, § 25, but is reviewable by petition, under section 24b. — *In re* Ives, U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 911.

26. BANKS AND BANKING— Signatures. — Where cards containing the signature of the secretary-treasurer of a foreign corporation were given a bank to guide it in paying checks drawn on deposits, it could not be held liable for the amount of checks so paid on the ground that they should have been signed by the president also.—Shoe Lasting Mach. Co. v. Western Nat. Bank, 75 N. Y. Supp. 627.

27. BENEFIT SOCIETIES—Ex Post Facto By-law. — *Ex post facto* by-law, reducing the benefit to be recovered under a benefit certificate in case of suicide, held not to affect certificates previously issued.—Bottjer v. Supreme Council American Legion of Honor, 75 N. Y. Supp. 895.

28. BOUNDARIES—Federal Question.—A decision of the state court that the courses and distances set forth in a United States patent did not bring the eastern boundary of the land to the waters of the Mississippi river raises no federal question, giving the Supreme Court of the United States jurisdiction. — Sweringen v. City of St. Louis, U. S. S. C., 22 Sup. Ct. Rep. 569.

29. BRIBERY— House of Prostitution. — On a prosecution of a police officer for taking a bribe to permit without interference a house of prostitution, evidence that the proprietress, who paid the bribe, purchased furniture afterwards for the house, is inadmissible. — People v. Bissert, 75 N. Y. Supp. 630.

30. CARRIERS—Failure to Deliver Goods. — Where an issue was whether a railroad company had delivered to a consignee all the goods received, it was error to reject evidence that the car was sealed at the loading point and remained sealed until delivery to the consignee.—Missouri, K. & T. Ry. Co. v. Simonson, Kan., 68 Pac. Rep. 653.

31. CHATTEL MORTGAGES—Household Goods.—A chattel mortgage including household goods, not signed by mortgagor's wife, held not void, under 2 Gen. St. p. 2111, § 41, where it does not appear that such goods were in the use and possession of the family in the state.—Dunham v. Cramer, N. J., 51 Atl. Rep. 1011.

32. COMMERCE — Pure Food Law.—The provisions of the pure food law of Ohio, prohibiting the sale of adulterated food products, are within the police powers of the state, and are constitutional and valid as applied to articles brought into the state from other states and sold in the original packages.—Arbuckle v. Blackburn, U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 616.

33. COMPROMISE AND SETTLEMENT—Partnership's Accounting.—In an action to impeach an accounting for mistake and fraud, the nature of the fraud must be set forth, together with the particulars of the mistake.—Knox v. Pearson, Kan., 68 Pac. Rep. 613.

34. CONSTITUTIONAL LAW—Due Process of Law.—Laws 1893, ch. 100, making specification of weights in bills of lading issued by railroad companies conclusive as to the correctness thereof, is unconstitutional, because denying to the companies due process of law.—Missouri, K. & T. Ry. Co. v. Simonson, Kan., 68 Pac. Rep. 603.

35. CONSTITUTIONAL LAW—Ordinance Impairing Contract.—A bill in equity, alleging that a contract right of a waterworks company with a municipality is impaired by an ordinance of the state, held one arising under the laws and constitution of the United States, so as to give a circuit court of the United States jurisdiction thereof. —Vicksburg Waterworks Co. v. City of Vicksburg, U. S. S. C., 22 Sup. Ct. Rep. 585.

36. CONSTITUTIONAL LAW — Commerce.—A privileged tax imposed by a state on merchandise brokers, whose business is confined to soliciting orders from wholesale dealers within the state as agents for non resident parties for goods to be shipped by them, held an unconstitutional invasion of the commerce clause of the constitution of the United States.—Stockard v. Morgan, U. S. S. C., 22 Sup. Ct. Rep. 576.

37. CONTEMPT—Punishment —Disobedience of a subpœna to attend court as a witness is an indirect contempt committed out of the presence of the court, and therefore, under Laws 1901, ch. 123, punishable only by formal accusation, arrest, plea, and trial.—State v. Anders, Kan., 68 Pac. Rep. 668.

38. CORPORATIONS—Bonds Issued by De Facto Corporation.—A *de facto* corporation, which has received full consideration for bonds issued by it, cannot set up the fact that it was never legally incorporated, in an action by a *bona fide* holder.—Tulare Irr. Dist. v. Shepard, U. S. S. C., 22 Sup. Ct. Rep. 531.

39. CORPORATIONS — Illegal Dividends.—Under Sess. Laws 1896, ch. 185, § 30, stockholders who have received dividends out of the capital stock cannot maintain a suit in the company's behalf to compel the directors to repay the amount of such dividends to the company, without regard to the company's financial condition.—Siegman v. Maloney, N. J., 51 Atl. Rep. 1003.

40. CORPORATIONS — Liability of Stockholders.—Pleas in an action by a special receiver of a Minnesota corporation to enforce the individual liability of a stockholder held not to state any ground for the refusal of a court of another jurisdiction to entertain the action upon the principles of comity.—Hale v. Calder, U. S. C. C., D. R. I., 113 Fed. Rep. 670.

41. CORPORATIONS—Statutory Liability of Stockholder. —The individual liability of a stockholder in a corporation created by the statute of Minnesota is not to the corporation, but to its creditors; and hence, in a suit by a special receiver to enforce such liability against a stockholder, the defendant cannot set off an indebtedness due from the corporation to him.—Burget v. Robinson, U. S. C. C. of App., First Circuit, 113 Fed. Rep. 669.

42. COURTS—Jurisdiction.—The jurisdiction of the supreme court is determined by the amount plaintiff be-

low might have recovered under the allegations of his petition.—Pampel v. Downey, Kan., 68 Pac. Rep. 607.

43. COVENANTS — Burden of Proof.—In an action by a grantee on a covenant of seisin, the burden is on plaintiff to show that his grantor had no title when the conveyance was made.—Wine v. Woods, Ind., 63 N. E. Rep. 759.

44. CRIMINAL EVIDENCE — Res Gestæ.—In prosecution for murder, declarations by defendant on starting toward deceased held admissible as part of the *res gestæ*.—Campbell v. State, Ala., 31 South. Rep. 802.

45. CRIMINAL LAW — Plea in Abatement.—A plea in abatement to an indictment, that certain instuctions were given to the persons summoned as grand jurors, by those in authority, held insufficient, where it was not alleged who were those in authority.—United States v. Greene, U. S. D. C., S. D. Ga., 113 Fed. Rep. 683.

46. CRIMINAL TRIAL—Argument.—Allowing prosecuting attorney, on a prosecution for murder, to assume in his argument that a threat had been made by defendant against deceased, when the evidence thereof was conflicting, held error.—Middleton v. State, Miss., 31 South. Rep. 809.

47. CRIMINAL TRIAL—Re-reading Testimony.—Where, on a criminal prosecution, the testimony of a witness was read to the jury at their request, it was not error for the judge to have the last question re-read to him.—People v. Eaton, Cal., 68 Pac. Rep. 588.

48. CRIMINAL TRIAL—Waiver of Objection.—An objection that an indictment was indefinite, because charging that the offense was committed "on or about" a certain day, was not available on appeal, when no motion to quash was made, and the objection was not raised in the demurrer interposed below.—Ortega v. Territory, Ariz., 68 Pac. Rep. 544.

49. CUSTOMS AND USAGES—Seasonable Acceptance of Offer —A certain, definite, uniform, reasonable custom, in dealings of the kind by cablegram, that acceptance of offer be sent in 24 hours, held binding.—Robeson v. Pels, Pa., 51 Atl. Rep. 1028.

50. CUSTOMS DUTIES — American Artists.—Regulation prescribed by secretary of treasury that an American artist can live abroad only five years, with right to have his paintings admitted free of duty under Tariff Act 1897, par. 703, held not sustainable.—Knoedler v. United States, U. S. C. C., S. D. N. Y., 113 Fed. Rep. 999.

51. CUSTOMS DUTIES — Tariff Act.—Merchandise composed of silk and wool, silk being the component material of chief value, cannot be classified under Tariff Act 1890, par. 414, being within the proviso thereto.—Arnold v. United States, U. S. C. C., S. D. N. Y., 113 Fed. Rep. 1004.

52. DAMAGES — Action on Note.—In action on note, where defendant demanded a jury trial, but afterwards agreed to judgment by default after a specified time "for the full amount of the claim sued" on, including interest and costs, it was not entitled to a jury to assess the damages.—People's Ice Co. v. People's Nat. Bank, Ala., 31 South. Rep. 804.

53. DAMAGES—Due Care After Injury.—In an action for injuries, plaintiff may state that he was attended by a certain physician, whose reputation as a physician was good, as showing due care in employing a reputable physician to treat his wounds.—Baker v. Borello, Cal., 68 Pac. Rep. 591.

54. DAMAGES — Seaman's Loss of Leg.—A seaman 20 years old, strong and in good health, who lost his leg from an injury received in the service of the ship, through the failure of the master to put into port where he could obtain surgical attendance, held entitled to damages in the sum of $3,000.—The Iroquois, U. S. D. C., N. D. Cal., 113 Fed. Rep. 964.

55. DAMAGES — Special Contract.—Where a building contractor is stopped by the other party, in an action by the contractor on the special contract, the compensation as to the work already performed is measured by the contract price.—Hoyle v. Stellwagen, Ind., 63 N. E. Rep. 780.

56. DEDICATION—Roads.—Failure of a county or municipality to open or work roads laid out on a plat of land does not defeat the right of the public therein, unless barred by adverse user.—Spencer v. Peterson, Oreg., 68 Pac. Rep. 519.

57. DEEDS—Duress.—A deed to a county, executed by the wife of a defaulting treasurer to prevent his prosecution, held void as procured by duress.—Allen v. Leflore County, Miss., 31 South. Rep. 815.

58. DEEDS—Judicial Notice.—Where property is described as being in a certain county, failure to name the meridian from which the township and range were numbered will not invalidate the deed, as the court takes judicial knowledge of the meridian.—Harrington v. Goldsmith, Cal., 68 Pac. Rep. 594.

59. DEEDS — Ratification.—A deed by daughter of the grantee, executed shortly after coming of age, cannot be attacked after ratification as executed by undue influence.—Keller v. Lamb, Pa., 51 Atl. Rep. 982.

60. ELECTION OF REMEDIES—Priorities.—An action of ejectment, based on a patent issued prior to the initiation by the defendant of a mining claim for which he has applied for a patent, is not inconsistent with a claim adverse to that application, under Rev. St. § 2326.—Larned v. Jenkins, U. S. C. C. of App., Eighth Circuit, 113 Fed. Rep. 631.

61. ELECTRICITY—Proximate Cause.—That an electric light company allowed plaintiff to attach his telephone wire to its electric light poles held not the proximate cause of his injury.—Consolidated Electric Light & Power Co. v. Koepp, Kan., 68 Pac. Rep. 608.

62. EQUITY—Action by Stockholders.—Where a stockholder, being unable to induce the directors of a corporation whose stock he holds to bring an action at law, applies to a court of equity to aid him, he must show to its satisfaction that the result of the action will be to promote justice and will not produce inequitable results.—Siegman v. Maloney, N. J., 51 Atl. Rep. 1003.

63. EQUITY — Jurisdiction Determined. — Fquitable jurisdiction must be determined by conditions existing when the bill is filed.—Busch v. Jones, U. S. S. C., 22 Sup. Ct. Rep 511.

64. EQUITY — Reopening Hearing Before Master.—A hearing before a master will not be reopened by the court, after the master's report has been confirmed, to permit a party to correct testimony which he made no effort to correct on the hearing, relying on his exception to the report on the ground that the testimony was incompetent.—Cimiotti Unhairing Co. v. Bowsky, U. S. C. C., S. D. N. Y., 113 Fed. Rep. 699.

65. ESTOPPEL — Duress.—A husband signing a deed without warranty executed by his wife through duress for his debt, held, under Code 1880, §§ 1235, 1195, estopped from claiming the portion of the land conveyed which he afterwards inherited from the wife.—Allen v. Leflore County, Miss., 31 South. Rep. 815.

66. ESTOPPEL — Infringement of Patent.—In a suit for infringement of a patent against a corporation and a person who is a stockholder and officer therein, the fact that the latter as an individual may be precluded from denying the validity of the patent cannot affect the rights of his codefendant.—American Coal Pad Co. v. Phœnix Pad. Co., U. S. C. C. of App., Fourth Circuit, 113 Fed. Rep. 629.

67. ESTOPPEL—Tort or Assumpsit.—A plaintiff, whose cause of action must be treated as in tort to involve an amount sufficient to give the court jurisdiction, cannot prevent an abatement, because facts are averred from which a contract to pay a sum below the jurisdiction of the court might be implied. — Bank of Iron Gate v. Brady, U. S. S. C., 22 Sup. Ct. Rep. 529.

68. EVIDENCE—Admissions.—Upon a reference to ascertain the profits realized by a defendant from the use of infringing machines, his testimony in another suit as to such profits is admissible against him as an admis-

sion.—Cimiotti Unhairing Co. v. Bowsky, U. S. C. C., S. D. N. Y., 113 Fed. Rep. 698.

69. EVIDENCE—Qualification of Expert.—A professor of chemistry, otherwise qualified as an expert, is not disqualified from giving his opinion as to the cause of an explosion of nitro-glycerine, in answer to a hypothetical question, by the fact that he has had no practical experience in its manufacture.—Bradford Glycerine Co. v. Kizer, U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 894.

70. EXECUTION—Sheriff's Sale.—Where a purchaser on foreclosure receives a sheriff's certificate, but no deed, and subsequently his interest is sold on execution, the execution purchaser takes all the equitable title of the execution debtor.—Oliver v. Dougherty, Ariz., 68 Pac. Rep. 553.

71. EXECUTORS AND ADMINISTRATORS — Indebtedness to Estate.—An executor refusing to pay a debt which he owes the estate may be removed for mismanagement, under Mills' Ann. Codes & St. § 4719.—Haines v. Christie, Colo., 68 Pac. Rep. 679.

72. EXECUTORS AND ADMINISTRATORS—Minor's Right to Recover.—A paragraph of the complaint in an action by a minor to recover for work and labor rendered decedent in his lifetime, on a promise to make provision for the servant by will, held bad, because not averring that plaintiff had been emancipated.—Gullet v. Gullet, Ind., 63 N. E. Rep. 782.

73. EXECUTORS AND ADMINISTRATORS—Presumption.—The bill in an action by an heir to recover from defendant money alleged to have been wrongfully paid by an executor held to raise a conclusive presumption that certain legacies by the executor were properly paid.—Sherman v. American Congregational Assn., U. S. C. C. of App., First Circuit, 113 Fed. Rep. 609.

74. FEDERAL COURTS — Enjoining Criminal Prosecutions.—A suit against an officer of a state to enjoin him from instituting criminal prosecutions under a statute conceded to be valid is in effect one against the state, of which a federal court cannot take jurisdiction.—Arbuckle v. Blackburn, U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 616.

75. FEDERAL COURTS—Federal Question Presented in State Court.—Denial of a motion in arrest of judgment of a state court enforcing a state statute, by which the invalidity of such statute was set up as repugnant to the fourteenth amendment of the United States constitution, held to present a federal question.—Consolidated Coal Co. v. People of State of Illinois, U. S. S. C., 22 Sup. Ct. Rep. 616.

76. FEDERAL COURTS—Original Jurisdiction.—A suit on bond of a clerk of a United States court held a suit arising under the laws of the United States, of which a circuit court has original jurisdiction without diversity of citizenship.—Howard v. United States, U. S. S. C., 22 Sup. Ct. Rep. 543.

77. FEDERAL COURTS—Original Jurisdiction.—The Supreme Court of the United States held to have original jurisdiction of a suit filed by the state of Kansas against the state of Colorado, to determine whether the latter state could deprive the state of Kansas of water from the Arkansas river.—State of Kansas v. State of Colorado, U. S. S. C., 22 Sup. Ct. Rep. 552.

78. FEDERAL COURTS — Power to Review Decision of State Supreme Court.—The final judgment of the highest court of a state held not reviewable in the Supreme Court of the United States as a decision sustaining validity of state statute, challenged as repugnant to the federal constitution, where question is not raised in the trial court and the highest court refuses to pass on the same.—Erie R. R. v. Purdy, U. S. S. C., 22 Sup. Ct. Rep. 605.

79. FEDERAL COURTS—Service in Other Districts.—Except in suits of a local nature to enforce a lien or claim against property within the district, and upon a proper order, or in suits for infringement of a patent, there is no authority of law for the service of process issued by a circuit court of the United States outside of the district.—Cely v. Griffin, U. S. C. C., D. S. Car., 113 Fed. Rep. 981.

80. FEDERAL COURTS—Unconstitutional Act of Congress.—Where plaintiff's right to recover depends on the unconstitutionality of an act of congress, the circuit court has original jurisdiction without diversity of citizenship.—Patton v. Brady, U. S. S. C., 22 Sup. Ct. Rep. 493.

81. FIRE INSURANCE—Appraisement.—A general averment, in an action on a fire policy, that insured has performed all its conditions, held not to cure a complaint which shows the nonperformance of a condition requiring appraisement of loss before action.—Vernon Ins. & Trust Co. v. Maitlen, Ind., 63 N. E. Rep. 755.

82. FIRE INSURANCE — Subrogation. — In an action against a railway company on its statutory liability to property owners for damages by fire, an insurance company might be made a party plaintiff and subrogated to plaintiff's rights —Crissey & Fowler Lumber Co. v. Denver & R. G. R. Co., Colo., 68 Pac. Rep. 670.

83. FOOD—Police Powers of State. — That an article of food or drink is prepared by a process which is or has been protected by letters patent of the United States does not prevent it from coming within the operation of laws passed by a state in the exercise of its police powers.—Arbuckle v. Blackburn, U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 616.

84. FRAUD—Pleading. — Where plaintiff seeks to recover because of fraud of defendants, based on misrepresentations, he must allege and prove what the misrepresentations were, that they were false, that he believed them to be true, and that he relied and acted upon them.—Grentner v. Fehrenschield, Kan., 68 Pac Rep. 619.

85. FRAUDS, STATUTE OF — Quantum Meruit.—Where services are rendered on an oral agreement to make provision for the servant by will, and the employer dies without making such provision, the servant may recover the value of his services from the estate on a *quantum meruit*, though the promise itself is within the statute of frauds.—Gullet v. Gullet, Ind., 63 N. E. Rep. 782.

86. GRAND JURY—Irregularity in Drawing Grand Jury —Where grand jurors were lawfully chosen by jury commissioners of opposing political faiths, it is of no moment that their names were placed in the jury box by the handful, instead of alternately by the clerk and by the commissioner.—United States v. Greene, U. S. D. C., E. D. Ga., 113 Fed. Rep. 683.

87. GUARDIAN AND WARD—Custody of Ward.—Burns' Rev. St. 1901, § 2682, providing that, where a minor has no father nor mother living, the guardian is entitled to the minor's custody, is mandatory, and the wishes of the ward as to who shall have custody of her are not controlling.—Palin v. Voliva, Ind., 63 N. E. Rep. 760.

88. HABEAS CORPUS—Court Without Legal Existence. —One deprived of his liberty under a process issued on final judgment by a court which he claims has no legal existence may maintain *habeas corpus* to test such jurisdiction.—*In re* Norton, Kan., 68 Pac. Rep. 639.

89. HABEAS CORPUS—Function. — The writ of *habeas corpus* is effective to challenge a judgment rendered by a court without jurisdiction.—Deming v. McClaughry, U. S. C. C. of App., Eighth Circuit, 113 Fed. Rep. 639.

90. HABEAS CORPUS—Right to Discharge. — Where a sentence has been imposed which neither the verdict nor the statute authorized, the defendant is entitled to discharge on a writ of *habeas corpus*.—*In re* Burns, U. S. C. C., W. D. Ark., 113 Fed. Rep. 987.

91. HEALTH—Liability for Destruction of Property.—Under Rev. St. 1587, pars. 381, 383, 397, a county held liable for a house and goods therein, destroyed by order of its board of supervisors under advice of a physician to prevent the spread of a contagious disease.—Haupt v. Maricopa County, Ariz., 68 Pac. Rep. 525.

92. HOMICIDE—Instruction. — Where, on prosecution for murder, it was shown that defendant fired two shots,

but that deceased was killed by the first, it was error to predicate an instruction upon the theory that deceased was killed by the second shot.— Middleton v. State, Miss., 31 South. Rep. 809.

93. INJUNCTION—Anticipating Illegal Action by Municipality.—Apprehension that illegal action by a municipality, impairing its contract with a waterworks company, entitles the company to maintain suit for equitable relief in advance of any actual proceedings on the part of the city to impair such rights. — Vicksburg Waterworks Co. v. City of Vicksburg, U. S. S. C., 22 Sup. Ct. Rep. 585.

94. INJUNCTION—Misuse of Court's Opinion.—The publication of a circular by a complainant in a suit for infringement of a patent, making extravagant claims as to the scope of a decision in his favor, based upon his interpretation of the opinion, held not ground for the court's interference by injunction. — Hobbs Mfg. Co. v. Gooding, U. S. C. C. of App., First Circuit, 113 Fed. Rep. 615.

95. INJUNCTION—Slander.—A bill to restrain a slander that plaintiff is going out of a certain business held demurrable for want of equity. — Baltimore Life Ins. Co. v. Gleisner, Pa., 51 Atl. Rep. 1024.

96. INTERNAL REVENUE — Increase in Excise. — Congress by the war revenue act could impose an additional excise on the manufacture of tobacco, though it had been passed from the hands of the manufacturer, but had not reached the consumer. — Patton v. Brady, U. S. S. C., 22 Sup. Ct. Rep. 493.

97. INTERNAL REVENUE — Warrant to Confess Judgment. — Warrant of attorney to confess judgment incorporated in promissory note, is not a power of attorney within War Revenue Act June 13, 1898, and does not require a stamp. — Treat v. Tolman, U. S. C. C. of App., Second Circuit, 113 Fed. Rep. 892.

98. INTOXICATING LIQUORS— Illegal Sale. — The agent of an express company, who delivers to the consignee goods carried by his principal C. O. D., held not guilty of selling intoxicating liquors. — State v. Cairns, Kan., 68 Pac. Rep. 621.

99. JUDGES— Vacancy. — Const. art. 3, § 11, providing for appointments to fill vacancies in judicial offices "until the next regular election," refers to the next regular election for the filling of the particular class of judicial offices to which the appointment was made.— McIntyre v. Iliff, Kan., 68 Pac. Rep. 633.

100. JUDGMENT—Costs.—The court cannot include in an interlocutory decree in partition a judgment for costs against defendant, as it is only after final judgment that costs are to be allowed.—Harrington v. Goldsmith, Cal., 68 Pac. Rep. 594.

101. JUDGMENT — Limitations. — No action can be maintained on a domestic judgment which has been rendered for more than six years, and upon which no execution has ever been issued, and which has not been revived. — Smalley v. Bowling, Kan., 68 Pac. Rep. 630.

102. JUSTICES OF THE PEACE — Error in Entry of Judgment.—The consideration of an appeal bond staying execution on a judgment of a justice against "L" was not affected by a clerical misprison in entering the judgment as against "E."—Adler v. Staude, Cal., 68 Pac. Rep. 599.

103. LANDLORD AND TENANT—Liability of Lessee. — A lessee held liable to pay as an original lessee rent and taxes, notwithstanding his assignment to his co-lessee, and not to be entitled to a set-off against such liability. Holiday v. Nolan, Mo., 67 S. W. Rep. 663.

104. LANDLORD AND TENANT — Renewal of Lease. — Where a lease is renewed under a contract providing that tenant shall hold under the old lease, the rights of the parties are to be determined by the original lease. —Towle v. Weise, Kan., 68 Pac. Rep. 637.

105. LIBEL AND SLANDER—Special Damages. — Where pleadings in action for libel did not ask special damages, evidence that particular persons had denied plaintiff credit was inadmissible.—Rembt v. Roehr Pub. Co., 75 N. Y. Supp. 861.

106. LIMITATION OF ACTIONS— Amendment. — Action commenced before the bar of the statute, but by the wrong party, cannot be amended, after action is barred, so as to make the right party plaintiff.—Comrey v. East Union Tp., Pa., 51 Atl. Rep. 1025.

107. LIMITATION OF ACTIONS— "A Person in Prison."— One is "a person in prison," within the statute of limitations, where under arrest and in custody of the sheriff.—Lasater v. Waites, Tex., 67 S. W. Rep. 518.

108. LIMITATION OF ACTIONS— Discovery of Fraud. — Where an action for relief for fraud is brought by children against their mother, a finding that the fraud was discovered by actual examination after many years of the mother's accounts as guardian and administratrix, within two years from the date of the action, is not a sufficient finding to remove the case from the operation of limitations.— Black v. Black, Kan., 68 Pac. Rep. 662.

109. LIMITATION OF ACTIONS—Failure to File Report.— An action, brought in Connecticut in 1897, to recover debts of a Montana corporation from its trustees for failure to file a report in 1893, was barred, either under Code Civ. Proc. Mont. § 515, or Gen. St. Conn. § 1379. — Davis v. Mills, U. S. C. C., D. Conn., 113 Fed. Rep. 678.

110. MALICIOUS PROSECUTION—Malice. — Where a suspected criminal is arrested under an invalid warrant, sworn out by one having no resonable cause to believe defendant guilty, the act of placing defendant in jail while a friend is procuring bail held evidence of malice.—Stubbs v. Mulholland, Mo., 67 S. W. Rep. 650.

111. MALICIOUS PROSECUTION—Probable Cause.— The discharge of a prisoner, under Rev. St. 1889, § 4036, by a magistrate, is *prima facie* evidence, in a malicious prosecution case, or want of probable cause, even though the magistrate certifies, under section 4403, that there was probable cause for prosecution. — Stubbs v. Mulholland, Mo., 67 S. W. Rep. 650.

112. MANDAMUS—Demurrer.—Where a demurrer is interposed to the answer in *mandamus* proceedings, it relates back to the alternative writ, and it will be held insufficient if subject to demurrer. — Hover v. People, Colo., 68 Pac. Rep. 679.

113. MASTER AND SERVANT— Incompetent Servant.—A master cannot escape his responsibility for a failure to use proper diligence in the employment of persons who are competent to perform the duties with which they are charged by delegating his duty to an agent who is a fellow-servant with an injured employee. — Brady v. Western Union Tel. Co., U. S. C. C. of App., Sixth Circuit, 113 Fed. Rep. 909.

114. MASTER AND SERVANT—Personal Injury.—A *prima facie* case for plaintiff is made out by proof that injury to employee in a mine resulted from the unexplained giving way of the place he was required to pass over to reach his work.—Lentino v. Port Henry Iron Ore Co., 75 N. Y. Supp. 755.

115 MINES AND MINING—Following Vein.— Act July 26, 1866, t..ough it permits the patentee of a lode mining claim to follow it beyond the boundaries on its dip or descending course, does not grant him the right to follow on its strike his vein with its dips, angles, and variations beyond the boundaries of his location. — Larned v. Jenkins, U. S. C. C. of App., Eighth Circuit, 113 Fed. Rep. 634.

116. MINES AND MINING — Order for Inspection.—To entitle one, under Code Civ. Proc. § 1317, to an order for inspection and survey of a mine, whether for the protection of his interest therein or in another mine, he must have an interest in the mine other than that a lode runs into it from his adjoining mine.—State v. District Court of Second Judicial Dist., Mont., 68 Pac. Rep. 570.

117. MINES AND MINING—Suit to Quiet Title.—Where both plaintiff and defendant, in a suit to quiet title to a

mining claim, ask to have their titles quieted, each has the burden of showing the validity of his location; plaintiff to take the lead in such proof.—Shattuck v. Costello, Ariz., 68 Pac. Rep. 529.

118. MORTGAGES — Conveyance by Grantee. — Mortgagors who have conveyed the premises subject to the mortgage cannot complain of a decree in foreclosure setting aside a conveyance by their grantee.—Gandy v. Coleman, Ill., 63 N. E. Rep. 625.

119. MORTGAGES—Payment of Fees.—Where, in foreclosure, the court fixed attorney's fees substantially according to agreement in mortgage, it was immaterial that such agreement was not incorporated in the note which the mortgage secured.—Hellier v. Russell, Cal., 68 Pac. Rep. 581.

120. MORTGAGES—Redemption.—A suit to redeem real estate from a sale under a mortgage alleged to have been voidable for irregularities, and to constitute the purchaser and his grantees merely mortgagees in possession, may be maintained on general equitable principles, regardless of statute, by the mortgagor or any one who has succeeded to his rights in the land.—H. B. Claflin Co. v. Middlesex Banking Co., U. S. C. C., E. D. Ark., 113 Fed. Rep. 958.

121. MUNICIPAL CORPORATIONS—Actions Ex Delicto.—Rev. St. 1899, § 5854, providing that no costs shall be recovered in any action against a city of the third class on any unliquidated claim unless a statement thereof has been presented to council for audit, does not apply to actions *ex delicto*.—Haggard v. Carthage, Mo., 67 S. W. Rep. 567.

122. MUNICIPAL CORPORATIONS—Building Tracks in Highway.—Where a city authorizes a railroad to lay a track in a street, it may not thereafter, without consent of such railroad, authorize another railway to use such track.—Texarkana & Ft. S. Ry. Co. v. Texas & N. O. R. Co., Tex., 67 S. W. Rep. 525.

123. MUNICIPAL CORPORATIONS—Explosion of Sewer.—In an action against a city for the death of plaintiff's intestate, caused by the explosion of a public sewer, the evidence of the explosion and the consequent injury does not establish a *prima facie* case of defendant's negligence.—Fuchs v. City of St. Louis, Mo., 67 S. W. Rep. 610.

124. NEGLIGENCE — Invitation to Children. — Maintenance by a electric light company of spikes in poles to allow of ascent for placing and repairing wires held not an invitation to children to climb, so as to make the company liable for injury therefrom.—Simonton v. Citizens' Electric Light & Power Co., Tex., 67 S. W. Rep 530.

125. NEGLIGENCE—Liability for Falling Walls.—Owner of brick building partially destroyed by fire held not liable for injuries resulting from the subsequent falling of its walls.—Freeman v. Carter, Tex., 67 S. W. Rep. 527

126. PARTITION — Ownership of Land. — Where a husband collects money due his wife, and invests it in land in his name, but disclaims title, partition after his death will not lie on behalf of his children as his heirs, as against the widow claiming to own the property. — Black v. Black, Kan., 68 Pac. Rep. 662.

127. PARTNERSHIP — Contribution to Losses. — Under an agreement that partners shall contribute equally to losses, one of them, having paid more thereof than the other, held entitled to be reimbursed by him.—Erben v. Heston, Pa., 51 Atl. Rep. 1025.

128. PASTURAGE—Liability of One Who Pastures Cattle. —Terms of a contract making defendant liable for such of plaintiff's cattle as should "get out" of defendant's pasture held not to render him liable for cattle which were driven out and destroyed by a violent storm.—Wells v. Sutphin, Kan., 68 Pac. Rep. 648.

129. PATENTS — Device Not Claimed Abandoned. — Where a patentee has made his claim, he has thereby abandoned all other combinations and improvements that are not mere invasions of the device, combination, or improvement which he claims. — Kinloch Tel. Co. v. Western Electric Co., U. S. C. C. of App., Eighth Circuit, 113 Fed. Rep. 652.

130. PATENTS — Doctrine of Equivalents. — A patentee is not to be denied protection commensurate with the scope of his actual and distinctly described invention by wholly excluding him from the benefit of the doctrine of equivalents. — Lepper v. Randall, U. S. C. C. of App., Third Circuit, 113 Fed. Rep. 627.

131. PAYMENT — Presumption. — The presumption of payment from lapse of time is not a bar to action, but merely a rule of evidence affecting the burden of proof, and obtains against the state, as it does against an individual.—*In re* Ash's Estate, Pa., 51 Atl. Rep. 1030.

132. PHYSICIANS AND SURGEONS—Board of Medical Examiners. — Laws 1901, ch. 254, creating a state board of medical examiners, is not unconstitutional, as discriminating, because providing that nothing in the act shall interfere with any religious beliefs in the treatment of diseases.—State v. Wilcox, Kan., 68 Pac. Rep. 634.

133. PLEADING — Amendment. — Amendment which is more than merely formal should not be allowed without notice. — Comrey v. East Union Tp. Pa., 51 Atl. Rep. 1025.

134. PLEADING — Collateral Issues.—In a suit by a salvor against a ship and cargo to recover for salvage services, the court cannot determine issues which may incidentally or collaterally arise between ship and cargo. —The James Turpie, U. S. D. C., D. N. J., 113 Fed. Rep. 700.

135. PLEADING — Confusion of Theories. — A petition must be framed on a distinct theory, and where it is not so drawn, or there is confusion of theories, so that the court cannot determine upon which a recovery is sought, the petition is insufficient.—Grentner v. Fehrenschield, Kan., 68 Pac. Rep. 619.

136. PLEADING — Controversy Between States. — The rule that the truth of material matters is admitted by demurrer will not apply to a controversy between states, involving the question whether one state can deprive the other of the waters of a river, whereby injury is inflicted on the state and the inhabitants thereof. —State of Kansas v. State of Colorado, U. S. S. C., 22 Sup. Ct. Rep. 552.

137. PLEDGES — Collateral Security Notes.—A creditor who permits notes delivered to him as collateral security to become barred by limitations is chargeable therewith, if loss results to the debtor. — Farm Inv. Co. v. Wyoming College and Normal School, Wyo., 68 Pac. Rep. 561.

138. PRINCIPAL AND AGENT — Accounting. — A widow, allowing her son as her agent to collect the income of her dower estate for years, cannot, on his default, call for an accounting from the owner of the real estate.— De Witt v. De Witt, Pa., 51 Atl. Rep. 987.

139. PRINCIPAL AND SURETY.— Building Contract. — Though a contract executed by a school board for the erection of a building is void, because not made on advertised bids, the bond guarantying its performance is valid.—People's Lumber Co. v. Gillard, Cal., 68 Pac. Rep. 576.

140. PROHIBITION — Remedy at Law. — Pending trial under a complaint alleging an unlawful sale of liquor and the maintenance of a nuisance, a writ of prohibition enjoining the justice from proceeding further held improperly granted; there being other adequate remedies at law.—Mason v. Grubel, Kan., 68 Pac. Rep. 660.

141. PROPERTY — Fences.—Log and brush fence set up to inclose government land by one having no title, and placed by mistake partly on an adjoining tract, held to belong to one afterwards securing government deed to adjoining tract. — Hereford v. Pusch, Ariz., 68 Pac. Rep. 547.

142. PUBLIC LANDS — Collateral Attack. — A patent to lands from the state, which is not void on its face, cannot be attacked collaterally for any irregularity in the proceedings on which it was issued. — Harrington v. Goldsmith, Cal., 68 Pac. Rep. 594.

143. PUBLIC LANDS — Swamp Land Grant.—Whether a lake ever existed bordering on land patented to the state of Oregon under the swamp land grant, whose recession would leave the bed of the lake bare, to accrue to the owner of such land, is not concluded by a call in the official survey for a meander line along such lake. — French Glenn Live Stock Co. v. Springer, U. S. S. C., 22 Sup. Ct. Rep. 563.

144. RAILROADS—Escaping Fires.—Circumstantial evidence that a fire was of railroad origin should be sufficient to justify a reasonable and well-grounded inference by reasonable men, but need not exclude every possibility of a different cause.—Crissey & Fowler Lumber Co. v. Denver & R. G. R. Co., Colo., 68 Pac. Rep. 670.

145. RAILROADS — Licensee.—Where a person went to the depot grounds to leave some freight for the railroad company, he was properly there, and was not a mere licensee, upon the premises for his own convenience.—Ward v. Maine Cent. R. Co., Me., 51 Atl. Rep. 947.

146. RECEIVERS — Private Deed of Trust. — A private deed of trust held to confer no power on the trustee to sell the property while in his possession as receiver, after an appeal from a decree dissolving an injunction restraining the sale by the trustee.—Hitz v. Jenks, U. S. S. C. 22 Sup. Ct. Rep. 596.

147. SHERIFFS AND CONSTABLES — Term of Office. — Under Const. art. 9, § 3, the term of a sheriff is not limited to two years, but is for two years certain, and for an uncertain period thereafter, until his successor shall qualify, whether he is holding his first or his second term.—Pruitt v. Squires, Kan., 68 Pac. Rep. 643.

148. STATUTES — Construction. — Additional words of qualification, needed to harmonize a general and a prior special provision in the same statute, should be added in construction to the general provision, rather than the special one.—Rodgers v. United States, U. S. S. C., 22 Sup. Ct. Rep. 582.

149. STATUTES — Copied from Other States. — Where a statute is copied *verbatim* from the statutes of another state, it is presumed to have been adopted with the construction theretofore given by the supreme court of the state from which it is adopted. — Goldman v. Sotelo, Ariz., 68 Pac. Rep. 558.

150. STATUTES—Interpretation of Foreign Statute.—In interpreting a foreign statute as applied to a contract executed in a foreign state, the court will follow the rules of interpretation laid down by the courts of such state.—Roubicek v. Haddad, N. J., 51 Atl. Rep. 938.

151. STATUTES — Pollution of Streams.—Act 1899 (P. L. p. 73), prohibiting the pollution of streams the water of which is used by municipalities, is not in violation of the constitutional provision prohibiting the granting of special privileges, etc., to corporations. — Board of Health v. Diamond Mills Paper Co., N. J., 51 Atl. Rep. 1019.

152. STREET RAILROADS — Car Without Light or Gong. —Evidence of the negligence of a street railroad in running a car without light and without sounding a gong held to sustain a verdict for a child run over and injured. — Welsh v. United Traction Co., Pa., 51 Atl. Rep. 1026.

153. STREET RAILROADS — Collision with Wagon.— Whether the driver of a heavy wagon, colliding with street car, was guilty of contributory negligence, is for the jury. — Metropolitan St. Ry. Co. v. Slayman, Kan., 68 Pac. Rep. 628.

154. STREET RAILROADS — Ultra Vires Ordinance.— Street railway company, constructing railway on public road under an *ultra vires* ordinance, held to acquire no right as against another railway company constructing its railway in the same highway by proper authority.—Pennsylvania R Co. v. Inhabitants of Hamilton Tp., Mercer County, N. J., 51 Atl. Rep. 926.

155. TAXATION — Inheritance Tax as to Non-resident Alien. — Personal property passing under the will of a non-resident alien, executed in New York during a temporary sojourn there, held not subject to the inheritance tax imposed by War Revenue Act June 13 1898.— Moore v. Ruckgaber, U. S. S. C., 22 Sup. Ct. Rep. 521.

156. TOWN SITE—Deed of City Authorities.—The deed of city authorities authorized to convey lots in a town site cannot be collaterally assailed for failure of the authorities to perform certain requirements antecedent to its execution. — Larned v. Jenkins, U. S. C. C., of App., Eighth Circuit, 113 Fed. Rep. 634.

157. TRADE-MARKS AND TRADE-NAMES—Milk Cans.—In an action under Laws 1896, ch. 376, § 29, for using a milk can without the owner's consent, the court held not bound to accept defendant's uncorroborated, though uncontradicted, testimony as to where and when he got the can.—Bell v. Gibson, 75 N. Y. Supp. 753.

158. TRIAL — Judgment. — Where, after judgment had been entered on the general verdict in favor of plaintiff, defendant moved for judgment on the special findings notwithstanding the general verdict, such motion should be denied. — Citizens' St. R. Co. v. Reed, Ind., 63 N. E. Rep. 770.

159. TRIAL — Special Questions to Jury. — Where evidence as to certain material facts was conflicting, and the jury answered special questions, "Don't know," and one of the parties requested the court to retire the jury and resubmit the question, it was error to refuse.— Atchison, T. & S. F. Ry. Co. v. Hale, Kan., 68 Pac. Rep. 612.

160. USURY — Share of Profits —An agreement between partners, contributing unequal parts of the capital, for payment from profits of 10 per cent. interest on the excess of contribution by one, held not usurious. — Duffy v. Gilmore, Pa., 51 Atl. Rep. 1026.

161. WATERS AND WATER COURSES — Bonds of Irrigation District.—Defective organization of an irrigation district under the California irrigation act of March 7, 1887, held not chargeable, as against *bona fide* holders for value without notice of bonds issued by such district, by the owners of land who acquiesced in the issue of the bonds. — Tulare Irr. Dist. v. Shepard, U. S. S. C., 22 Sup. Ct. Rep. 531.

162. WATERS AND WATER COURSES — Injunction.—Act 1899 (P. L. p. 73), is violated, so as to authorize an injunction suit by the board of health, by the deposit of refuse in a stream which pollutes it at the place of deposit, though not at the place where a city gets its water supply. — Board of Health v. Diamond Mills Paper Co., N. J., 51 Atl. Rep. 1019.

163. WATERS AND WATER COURSES — Irrigation Districts.—Where one acted as the collector of an irrigation district in a sale under an assessment, and his right to the office was not questioned, the proceedings were not invalid because the collector, by reason of his residence, might have been disqualified to become a *de jure* officer. —Baxter v. Dickinson, Cal., 68 Pac. Rep. 601.

164. WATERS AND WATER COURSES—Riparian Rights.— Riparian proprietor held not entitled to so dam up stream as to cause loss of water by evaporation, to the injury of other proprietors below; and the fact that the water finds its source on his land is immaterial. — Barneich v. Mercy, Cal., 68 Pac. Rep. 589.

165. WILLS — Contest. — Evidence under which held, that an allowance of $2,500 to counsel for representing absent heirs in a will contest was not an abuse of discretion.—*In re* Roarke's Estate Ariz., 68 Pac. Rep. 527.

166. WILLS—Residuary Estate.— Under provision of a will, "If any of the legacies I have given should lapse and become a part of my residuary estate, then my said residuary estate shall be divided" among persons named, they take nothing thereunder; no legacies lapsing, though there is property not otherwise disposed of. —*In re* Corr's Estate, Pa., 51 Atl. Rep. 1032.

167. WITNESSES — Impeachment of Witnesses.—Error in sustaining an objection to a question seeking to lay the foundation for impeachment as to prior conversations by the witness is harmless, when not followed by an offer to establish such conversations.—Qualey v. Territory, Ariz., 68 Pac. Rep. 546.